United Nations

# Report of the International Law Commission

## Sixty-sixth session
## (5 May–6 June and 7 July–8 August 2014)

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**Official Records**
**Sixty-ninth session**
**Supplement No. 10 (A/69/10)**

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A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2014.*

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# Chapter I
# Introduction

1. The International Law Commission held the first part of its sixty-sixth session from 5 May to 6 June 2014 and the second part from 7 July to 8 August 2014 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Bernd H. Niehaus, Chairman of the sixty-fifth session of the Commission.

## A. Membership

2. The Commission consists of the following members:

Mr. Mohammed Bello Adoke (Nigeria)

Mr. Ali Mohsen Fetais Al-Marri (Qatar)

Mr. Lucius Caflisch (Switzerland)

Mr. Enrique J.A. Candioti (Argentina)

Mr. Pedro Comissário Afonso (Mozambique)

Mr. Abdelrazeg El-Murtadi Suleiman Gouider (Libya)

Ms. Concepción Escobar Hernández (Spain)

Mr. Mathias Forteau (France)

Mr. Kirill Gevorgian (Russian Federation)

Mr. Juan Manuel Gómez-Robledo (Mexico)

Mr. Hussein A. Hassouna (Egypt)

Mr. Mahmoud D. Hmoud (Jordan)

Mr. Huikang Huang (China)

Ms. Marie G. Jacobsson (Sweden)

Mr. Maurice Kamto (Cameroon)

Mr. Kriangsak Kittichaisaree (Thailand)

Mr. Ahmed Laraba (Algeria)

Mr. Donald M. McRae (Canada)

Mr. Shinya Murase (Japan)

Mr. Sean D. Murphy (United States of America)

Mr. Bernd H. Niehaus (Costa Rica)

Mr. Georg Nolte (Germany)

Mr. Ki Gab Park (Republic of Korea)

Mr. Chris Maina Peter (United Republic of Tanzania)

Mr. Ernest Petrič (Slovenia)

Mr. Gilberto Vergne Saboia (Brazil)

Mr. Narinder Singh (India)

Mr. Pavel Šturma (Czech Republic)

Mr. Dire D. Tladi (South Africa)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

Mr. Nugroho Wisnumurti (Indonesia)

Mr. Michael Wood (United Kingdom of Great Britain and Northern Ireland)

## B. Officers and the Enlarged Bureau

3. At its 3198th meeting, on 5 May 2014, the Commission elected the following officers:

| | |
|---|---|
| Chairman: | Mr. Kirill Gevorgian (Russian Federation) |
| First Vice-Chairman: | Mr. Shinya Murase (Japan) |
| Second Vice-Chairperson: | Ms. Concepción Escobar Hernández (Spain) |
| Chairman of the Drafting Committee: | Mr. Gilberto Vergne Saboia (Brazil) |
| Rapporteur: | Mr. Dire D. Tladi (South Africa) |

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

5. The Commission set up a Planning Group composed of the following members: Mr. S. Murase (Chairman), Mr. L. Caflisch, Mr. P. Comissário Afonso, Mr. A. El-Murtadi Suleiman Gouider, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. P. Šturma, Mr. E. Valencia-Ospina, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. D.D. Tladi (*ex officio*).

## C. Drafting Committee

6. At its 3200th, 3204th, 3210th, 3222nd and 3227th meetings, on 7, 14 and 23 May and on 11 and 18 July 2014, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Protection of persons in the event of disasters*: Mr. G.V. Saboia (Chairman), Mr. E. Valencia-Ospina (Special Rapporteur), Mr. M. Forteau, Mr. M.D. Hmoud, Mr. K. Kittichaisaree, Mr. S. Murase, Mr. S.D. Murphy, Mr. K.G. Park, Mr. E. Petrič, Mr. N. Singh, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. D.D. Tladi (*ex officio*).

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[1] Mr. L. Caflisch, Mr. E.J.A. Candioti, Mr. M. Kamto, Mr. B.H. Niehaus, Mr. E. Petrič and Mr. N. Wisnumurti.

[2] Ms. C. Escobar Hernández, Mr. J.M. Gómez-Robledo, Ms. M. G. Jacobsson, Mr. M. Kamto, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. E. Valencia-Ospina and Mr. M. Wood.

(b) *Expulsion of aliens*: Mr. G.V. Saboia (Chairman), Mr. M. Kamto (Special Rapporteur), Mr. E.J.A. Candioti, Mr. M. Forteau, Mr. J.M. Gómez-Robledo, Mr. M.D. Hmoud, Mr. K. Kittichaisaree, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. N. Singh, Mr. P. Šturma, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. M. Wood, and Mr. D.D. Tladi (*ex officio*).

(c) *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*: Mr. G.V. Saboia (Chairman), Mr. G. Nolte (Special Rapporteur), Mr. M.D. Hmoud, Mr. K. Kittichaisaree, Mr. S.D. Murphy, Mr. K.G. Park, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. D.D. Tladi (*ex officio*).

(d) *Immunity of State officials from foreign criminal jurisdiction*: Mr. G.V. Saboia (Chairman), Ms. C. Escobar Hernández (Special Rapporteur), Mr. E.J.A. Candioti, Mr. M. Forteau, Mr. H. Huang, Ms. M.G. Jacobsson, Mr. K. Kamto, Mr. K. Kittichaisaree, Mr. S.D. Murphy, Mr. K.G. Park, Mr. E. Petrič, Mr. N. Singh, Mr. P. Šturma, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. M. Wood, and Mr. D.D. Tladi (*ex officio*).

(e) *Identification of customary international law*: Mr. G.V. Saboia (Chairman), Mr. M. Wood (Special Rapporteur), Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. J.M. Gómez-Robledo, Mr. M.D. Hmoud, Mr. K. Kamto, Mr. K. Kittichaisaree, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. M. Vázquez-Bermúdez, and Mr. D.D. Tladi (*ex officio*).

7. The Drafting Committee held a total of 31 meetings on the five topics indicated above.

## D. Working Groups and Study Group

8. At its 3199th and 3218th meetings, on 6 May and 8 July 2014, the Commission reconstituted the following Working Group and Study Group:

(a) *Working Group on the Obligation to extradite or prosecute* (aut dedere aut judicare): Mr. K. Kittichaisaree (Chairman), Mr. A. El-Murtadi Suleiman Gouider, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. A. Laraba, Mr. S.D. Murphy, Mr. K.G. Park, Mr. N. Singh, Mr. P. Šturma, Mr. M. Vázquez-Bermúdez, and Mr. D.D. Tladi (*ex officio*).

(b) *Study Group on Most-Favoured-Nation clause*: Mr. D.M. McRae (Chairman), Mr. L. Caflisch, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. M.D. Hmoud, Mr. M. Kamto, Mr. S. Murase, Mr. S.D. Murphy, Mr. K.G. Park, Mr. N. Singh, Mr. P. Šturma, Mr. M. Vázquez-Bermúdez, Mr. M. Wood, and Mr. D.D. Tladi (*ex officio*).

9. The Planning Group reconstituted the following Working Group:

*Working Group on long-term programme of work for the quinquennium*: Mr. D. McRae (Chairman), Mr. L. Caflisch, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. K. Gevorgian, Mr. J.M. Gómez-Robledo, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. S. Murase, Mr. S.D. Murphy, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. N. Singh, Mr. P. Šturma, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. D.D. Tladi (*ex officio*).

## E. Secretariat

10. Mr. Miguel de Serpa Soares, Under-Secretary-General and United Nations Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission

and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Trevor Chimimba and Mr. Arnold Pronto, Senior Legal Officers, served as Senior Assistant Secretaries. Ms. Hanna Dreifeldt-Lainé and Mr. David Nanopoulos, Legal Officers, and Mr. Noah Bialostozky, Associate Legal Officer, served as Assistant Secretaries to the Commission.

## F. Agenda

11. At its 3198th meeting, on 5 May 2014, the Commission adopted an agenda for its sixty-sixth session consisting of the following items:

1. Organization of the work of the session.
2. Expulsion of aliens.
3. The obligation to extradite or prosecute (*aut dedere aut judicare*).
4. Protection of persons in the event of disasters.
5. Immunity of State officials from foreign criminal jurisdiction.
6. Subsequent agreements and subsequent practice in relation to the interpretation of treaties.
7. The Most-Favoured-Nation clause.
8. Provisional application of treaties.
9. Identification of customary international law.
10. Protection of the environment in relation to armed conflicts.
11. Protection of the atmosphere.
12. Programme, procedures and working methods of the Commission and its documentation.
13. Date and place of the sixty-seventh session.
14. Cooperation with other bodies.
15. Other business

# Chapter II
# Summary of the work of the Commission at its sixty-sixth session

12. With regard to the topic "**Expulsion of aliens**", the Commission adopted, on second reading, a set of 31 draft articles, together with commentaries thereto, on the expulsion of aliens, and, in accordance with article 23 of its Statute, the Commission recommended to the General Assembly to take note of the draft articles on the expulsion of aliens in a resolution, to annex the articles to the resolution, and to encourage their widest possible dissemination; and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles (chap. IV).

13. Concerning the topic "**Protection of persons in the event of disasters**", the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/668 and Corr.1 and Add.1) which dealt with the protection of relief personnel and their equipment and goods, as well as the relationship of the draft articles with other rules, and included a proposal for the use of terms.

14. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 21 draft articles, together with commentaries thereto, on the protection of persons in the event of disasters. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments, competent international organizations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2016. The Commission also indicated that it would welcome comments and observations on the draft articles from the United Nations, including the Office for the Coordination of Humanitarian Affairs and the United Nations Office for Disaster Risk Reduction, by the same date (chap. V).

15. In connection with the topic "**The obligation to extradite or prosecute (*aut dedere aut judicare*)**", the Commission re-constituted the Working Group on the topic. The Working Group continued to evaluate the work on this topic, particularly in the light of comments made in the Sixth Committee at the sixty-eighth session of the General Assembly on the 2013 report of the Working Group. On basis of the work of the Working Group, the Commission adopted the final report on the topic, and decided to conclude its consideration of the topic (chap. VI).

16. As regards the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/671), which contained, *inter alia*, six draft conclusions relating to the identification of subsequent agreements and subsequent practice, the possible effects of subsequent agreements and subsequent practice in interpretation, the forms and value of subsequent practice under article 31, paragraph 3 (b), of the 1969 Vienna Convention on the Law of Treaties, agreement of the parties regarding the interpretation of a treaty, decisions adopted within the framework of a Conference of States Parties, and the scope for interpretation by subsequent agreements and subsequent practice. Following the debate in Plenary, the Commission decided to refer the six draft conclusions proposed by the Special Rapporteur to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted five draft conclusions, together with commentaries thereto (chap. VII).

17. With respect to the topic "**Protection of the atmosphere**", the Commission considered the first report of the Special Rapporteur (A/CN.4/667). The report addressed the general objective of the project, including providing the rationale for work on the topic, delineating its general scope, identifying the relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject; and presented three draft guidelines concerning (a) the definition of the term "atmosphere; (b) the scope of the draft guidelines; and (c) the legal status of the atmosphere. Following the debate in plenary, the referral of the draft guidelines to the Drafting Committee was deferred, at the request of the Special Rapporteur, until next year (chap. VIII).

18. In relation to the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission considered the third report of the Special Rapporteur (A/CN.4/673), in which, *inter alia*, draft article 2 (e), on the definition of State official, and draft article 5, on the beneficiaries of immunity *ratione materiae*, were presented. Following the debate in plenary, the Commission decided to refer the two draft articles to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft article 2 (e), on the definition of State official, and draft article 5, on the persons enjoying immunity *ratione materiae*, together with commentaries thereto (chap. IX).

19. As regards the topic "**Identification of customary international law**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/672), which contained, *inter alia*, eleven draft conclusions, following an analysis of: the scope and outcome of the topic, the basic approach, as well as the two constituent elements of rules of customary international law, namely "a general practice" and "accepted as law". Following the debate in Plenary, the Commission decided to refer the eleven draft conclusions proposed by the Special Rapporteur to the Drafting Committee. The Commission took note of the interim report of the Chairman of the Drafting Committee, including the eight draft conclusions provisionally adopted by the Committee, which was submitted to the Commission for information (chap. X).

20. Concerning the topic "**Protection of the environment in relation to armed conflicts**", the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/674 and Corr.1), which, *inter alia*, presented an overview of views expressed by delegates in the Sixth Committee of the General Assembly, practice of States and international organizations, scope and methodology, use of terms, environmental principles, and issues relating to human and indigenous rights. The debate in the plenary addressed, among other issues, scope and methodology, use of terms, environmental principles, and human and indigenous rights (chap. XI).

21. In relation to the topic "**Provisional application of treaties**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/675) that sought to provide a substantive analysis of the legal effects of the provisional application of treaties. The debate revealed broad agreement that the basic premise underlying the topic was that, subject to the specificities of the treaty in question, the rights and obligations of a State which had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State (chap. XII).

22. Concerning the topic "**The Most-Favoured-Nation clause**", the Commission reconstituted the Study Group on the topic. The Study Group began it consideration of the draft final report, prepared by its Chairman, based on the working papers and other informal documents that had been considered by the Study Group in the course of its work since it began deliberations in 2009. The Study Group envisaged a revised draft final report to be presented for consideration at the sixty-seventh session of the Commission in 2015, taking into account comments made and amendments proposed by individual members of the Study Group during the present session (chap. XIII).

23. The Commission established a Planning Group to consider its programme, procedures and working methods (chap. XIV, sect. A). The Commission decided to include the topic "Crimes against humanity" in its programme of work, and to appoint Mr. Sean D. Murphy as Special Rapporteur for the topic (chap. XIV, sect. A.1). The Commission decided to include the topic "*Jus cogens*" in its long-term programme of work. The Commission endorsed the review and update of the list of possible topics, using the 1996 illustrative general scheme of topics[3] list as a starting point for that purpose. In this connection, it requested the Secretariat to review the 1996 list in the light of subsequent developments and prepare a list of potential topics ("survey"), accompanied by brief explanatory notes, by the end of the present quinquennium. It was understood that the Working Group on the long-term programme of work would continue to consider any topics that members may propose (chap. XIV, sect. A.2).

24. The Commission continued its exchange of information with the International Court of Justice, the Asian-African Legal Consultative Organization, the Inter-American Juridical Committee, the Committee of Legal Advisers on Public International Law of the Council of Europe and the African Union Commission on International Law.

25. The Commission decided that its sixty-seventh session be held in Geneva from 4 May to 5 June and 6 July to 7 August 2015 (chap. XIV, sect. B).

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[3] *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), Annex II.

# Chapter III
# Specific issues on which comments would be of particular interest to the Commission

## A. Subsequent agreements and subsequent practice in relation to treaty interpretation

26. The Commission requests, by 31 January 2015, States and international organizations:

(a) to provide it with any examples where the practice of an international organization[4] has contributed to the interpretation of a treaty; and

(b) to provide it with any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to, subsequent agreements or subsequent practice relevant for the interpretation of a treaty.

## B. Protection of the atmosphere

27. The Commission requests States to provide relevant information, by 31 January 2015, on domestic legislation and the judicial decisions of the domestic courts.

## C. Immunity of State officials from foreign criminal jurisdiction

28. The Commission requests States to provide information, by 31 January 2015, on their domestic law and their practice, in particular judicial practice, with reference to the following issues:

(a) the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction; and

(b) any exceptions to immunity of State officials from foreign criminal jurisdiction.

## D. Identification of customary international law

29. The Commission reiterates its request to States to provide information, by 31 January 2015, on their practice relating to the formation of customary international law and the types of evidence for establishing such law in a given situation, as set out in:

(a) official statements before legislatures, courts and international organizations; and

(b) decisions of national, regional and subregional courts.

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[4] See e.g. "established practice of the organization" in article 2 (b) on the Draft articles on the responsibility of international organizations, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), commentary at p. 78, paras. 16 and 17; article 2, para. 1 (j) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, A/CONF.129/15.

30. In addition, the Commission would welcome information about digests and surveys on State practice in the field of international law.

## E. Protection of the environment in relation to armed conflicts

31. The Commission requests information from States, by 31 January 2015, on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. The Commission would particularly appreciate receiving examples of:

(a) treaties, including relevant regional or bilateral treaties;

(b) national legislation relevant to the topic, including legislation implementing regional or bilateral treaties;

(c) case-law in which international or domestic environmental law was applied to disputes in relation to armed conflict.

32. The Commission would also like information from States as to whether they have any instruments aimed at protecting the environment in relation to armed conflict. Examples of such instruments include but are not limited to: national legislation and regulations; military manuals, standard operating procedures, Rules of Engagement or Status of Forces Agreements applicable during international operations; and environmental management policies related to defence-related activities.

## F. Provisional application of treaties

33. The Commission reiterates its request to States to provide information, by 31 January 2015, on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to:

(a) the decision to provisionally apply a treaty;

(b) the termination of such provisional application; and

(c) the legal effects of provisional application.

## G. Crimes against humanity

34. The Commission requests States to provide information, by 31 January 2015, on:

(a) whether the State's national law at present expressly criminalizes "crimes against humanity" as such and, if so:

(b) the text of the relevant criminal statute(s);

(c) under what conditions the State is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity (e.g. when the offense occurs within its territory or when the offense is by its national or resident); and

(d) decisions of the State's national courts that have adjudicated crimes against humanity.

# Chapter IV
# Expulsion of aliens

## A. Introduction

35. At its fifty-sixth session (2004), the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.[5] The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

36. From its fifty-seventh session (2005) to its sixty-fourth session (2012), the Commission received and considered eight reports by the Special Rapporteur,[6] a new version of the draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate,[7] a new draft workplan presented by the Special Rapporteur with a view to restructuring the draft articles,[8] a memorandum by the Secretariat[9] and comments and observations received from Governments.[10]

37. At its sixty-fourth session (2012), the Commission adopted on first reading a set of 32 draft articles on the expulsion of aliens, together with the commentaries thereto.[11] It decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.

## B. Consideration of the topic at the present session

38. At the present session, the Commission had before it the ninth report of the Special Rapporteur (A/CN.4/670), containing his proposals for reformulating the draft articles adopted on first reading in the light of the comments and observations of Governments (A/CN.4/669 and Add.1). At its 3199th meeting, on 6 May 2014, and at its 3201st to 3204th meetings, from 8 to 14 May 2014, the Commission considered the ninth report of the Special Rapporteur and instructed the Drafting Committee to commence the second reading of the entire set of draft articles on the basis of the proposals of the Special

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[5] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic "Expulsion of aliens" for possible inclusion in the Commission's long-term programme of work (*ibid., Fifty-third Session, Supplement No. 10* (A/53/10), para. 554) and, at its fifty-second session (2000), it confirmed that decision (*ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). A brief syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission (*ibid.*, annex). In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the inclusion of the topic in the long-term programme of work.

[6] A/CN.4/554 (preliminary report), A/CN.4/573 and Corr.1 (second report), A/CN.4/581 (third report), A/CN.4/594 (fourth report), A/CN.4/611 and Corr.1 (fifth report), A/CN.4/ 625 and Add.1 and 2 (sixth report), A/CN.4/642 (seventh report) and A/CN.4/651 (eighth report).

[7] A/CN.4/617.

[8] A/CN.4/618.

[9] A/CN.4/565 and Corr.1 (memorandum by the Secretariat).

[10] For the comments and observations received from Governments, see A/CN.4/604 and A/CN.4/628.

[11] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 41 to 43.

Rapporteur, taking into account the comments and observations of Governments and the debate in the plenary on the Special Rapporteur's report.

39. The Commission considered the report of the Drafting Committee (A/CN.4/L.832) at its 3217th meeting, on 6 June 2014, and adopted the entire set of draft articles on the expulsion of aliens on second reading (sect. E.1 below).

40. At its 3238th meeting, on 5 August 2014, the Commission adopted the commentaries to the draft articles mentioned above (sect. E.2 below).

41. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

## C. Recommendation of the Commission

42. At its 3238th meeting, on 5 August 2014, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly:

(a) To take note of the draft articles on the expulsion of aliens in a resolution, to annex the articles to the resolution, and to encourage their widest possible dissemination;

(b) To consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

## D. Tribute to the Special Rapporteur

43. At its 3238th meeting, on 5 August 2014, the Commission, after adopting the commentary to the draft articles on the expulsion of alien, adopted the following resolution by acclamation:

> "*The International Law Commission,*
>
> *Having adopted* the draft articles on the expulsion of aliens,
>
> *Expresses* to the Special Rapporteur, Mr. Maurice Kamto, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on the expulsion of aliens."

## E. Text of the draft articles on the expulsion of aliens

### 1. Text of the draft articles

44. The text of the draft articles adopted by the Commission on second reading at its sixty-sixth session is reproduced below.

**Expulsion of aliens**

**Part One**
**General provisions**

**Article 1**
**Scope**

1. The present draft articles apply to the expulsion by a State of aliens present in its territory.

2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

### Article 2
### Use of terms

For the purposes of the present draft articles:

(a) "expulsion" means a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State;

(b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

### Article 3
### Right of expulsion

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.

### Article 4
### Requirement for conformity with law

An alien may be expelled only in pursuance of a decision reached in accordance with law.

### Article 5
### Grounds for expulsion

1. Any expulsion decision shall state the ground on which it is based.

2. A State may only expel an alien on a ground that is provided for by law.

3. The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.

4. A State shall not expel an alien on a ground that is contrary to its obligations under international law.

## Part Two
## Cases of prohibited expulsion

### Article 6
### Rules relating to the expulsion of refugees

The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules:

(a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;

(b) a State shall not expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

### Article 7
### Rules relating to the expulsion of stateless persons

The present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

### Article 8
### Deprivation of nationality for the purpose of expulsion

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

### Article 9
### Prohibition of collective expulsion

1. For the purposes of the present draft article, collective expulsion means expulsion of aliens, as a group.

2. The collective expulsion of aliens is prohibited.

3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

### Article 10
### Prohibition of disguised expulsion

1. Any form of disguised expulsion of an alien is prohibited.

2. For the purposes of the present draft article, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from an action or an omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intended to provoke the departure of aliens from its territory other than in accordance with law.

### Article 11
### Prohibition of expulsion for the purpose of confiscation of assets

The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

### Article 12
### Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure

A State shall not resort to the expulsion of an alien in order to circumvent an ongoing extradition procedure.

## Part Three
## Protection of the rights of aliens subject to expulsion

### Chapter I
### General provisions

### Article 13
### Obligation to respect the human dignity and human rights of aliens subject to expulsion

1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.

2. They are entitled to respect for their human rights, including those set out in the present draft articles.

### Article 14
### Prohibition of discrimination

The expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

### Article 15
### Vulnerable persons

1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.

2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.

### Chapter II
### Protection required in the expelling State

### Article 16
### Obligation to protect the right to life of an alien subject to expulsion

The expelling State shall protect the right to life of an alien subject to expulsion.

### Article 17
### Prohibition of torture or cruel, inhuman or degrading treatment or punishment

The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

### Article 18
### Obligation to respect the right to family life

The expelling State shall respect the right to family life of an alien subject to expulsion. It shall not interfere arbitrarily or unlawfully with the exercise of such right.

### Article 19
### Detention of an alien for the purpose of expulsion

1. (a) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature.

(b) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.

2. (a) The duration of the detention shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority.

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(b) Subject to paragraph 2, detention for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

### Article 20
### Protection of the property of an alien subject to expulsion

The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

## Chapter III
## Protection in relation to the State of destination

### Article 21
### Departure to the State of destination

1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.

3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

### Article 22
### State of destination of aliens subject to expulsion

1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.

2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

### Article 23
### Obligation not to expel an alien to a State where his or her life would be threatened

1. No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. A State that does not apply the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

### Article 24
### Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

## Chapter IV
## Protection in the transit State

### Article 25
### Protection in a transit State of the human rights of an alien subject to expulsion

A transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

## Part Four
## Specific procedural rules

### Article 26
### Procedural rights of aliens subject to expulsion

1. An alien subject to expulsion enjoys the following procedural rights:

(a) the right to receive notice of the expulsion decision;

(b) the right to challenge the expulsion decision, except where compelling reasons of national security otherwise require;

(c) the right to be heard by a competent authority;

(d) the right of access to effective remedies to challenge the expulsion decision;

(e) the right to be represented before the competent authority; and

(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.

3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.

4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for a brief duration.

### Article 27
### Suspensive effect of an appeal against an expulsion decision

An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision when there is a real risk of serious irreversible harm.

### Article 28
### International procedures for individual recourse

An alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

## Part Five
## Legal consequences of expulsion

### Article 29
### Readmission to the expelling State

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

### Article 30
### Responsibility of States in cases of unlawful expulsion

The expulsion of an alien in violation of the expelling State's obligations set forth in the present draft articles or in any other rule of international law entails the international responsibility of that State.

### Article 31
### Diplomatic protection

The State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of the alien in question.

## 2. Text of the draft articles and commentaries thereto

45. The text of the draft articles, together with commentaries, adopted by the Commission on second reading at its sixty-sixth session is reproduced below.

### Expulsion of aliens

### General commentary

(1) Although the expulsion of aliens is a sovereign right of the State, it brings into play the rights of an alien subject to expulsion and the rights of the expelling State in relation to the State of destination of the person expelled. The subject matter thus does not fall outside international law. State practice on various aspects of the expulsion of aliens has been evolving at least since the nineteenth century. Several international treaties also contain provisions concerning one or another aspect of this topic. The applicable international case-

law has been accumulating since the mid-nineteenth century and has in fact facilitated the codification of various aspects of international law. This basis in case-law has recently been reinforced by a judgment of the International Court of Justice[12] that clarifies the relevant law on various points. Nevertheless, the entire subject area does not have a foundation in customary international law or in the provisions of international conventions of a universal nature. On certain aspects, practice is still limited, although it does point to trends permitting some prudent development of the rules of international law in this domain. This is why the present draft articles involve both the codification and the progressive development of fundamental rules on the expulsion of aliens.

(2) The draft articles are divided into five parts. Part One, entitled "General provisions", delimits the scope of the draft articles, defines the two key terms "expulsion" and "alien" for the purposes of the draft articles and then sets forth a few general rules relating to the right of expulsion, the requirement for conformity with law and the grounds for expulsion. Part Two of the draft articles deals with various cases of prohibited expulsion. Part Three addresses the question of protection of the rights of aliens subject to expulsion, first from a general standpoint (chapter I), then by dealing more specifically with the protection required in the expelling State (chapter II), protection in relation to the State of destination (chapter III) and protection in the transit State (chapter IV). Part Four of the draft articles concerns specific procedural rules, while Part Five sets out the legal consequences of expulsion.

(3) The formulation "alien[s] subject to expulsion" used throughout the draft articles is sufficiently broad in meaning to cover, according to context, any alien facing any phase of the expulsion process. That process generally begins when a procedure is instituted that could lead to the adoption of an expulsion decision, in some cases followed by a judicial phase; it ends, in principle, with the implementation of the expulsion decision, whether that involves the voluntary departure of the alien concerned or the forcible implementation of the decision. In other words, the formulation covers the situation of the alien not only in relation to the expulsion decision adopted in his or her regard but also in relation to the various stages of the expulsion process that precede or follow the adoption of the decision and may in some cases involve the taking of restrictive measures against the alien, including possible detention for the purpose of expulsion.

## Part One
## General provisions

### Article 1
### Scope

1. The present draft articles apply to the expulsion by a State of aliens present in its territory.

2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

### Commentary

(1) The purpose of draft article 1 is to delimit the scope of the draft articles. While paragraph 1 defines the scope in general terms, paragraph 2 excludes certain categories of individuals who would otherwise be covered by virtue of paragraph 1.

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[12] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639.

(2) In stating that the draft articles apply to the expulsion by a State of aliens who are present in its territory, paragraph 1 defines the scope of the draft articles both *ratione materiae* and ratione personae. With regard to scope *ratione materiae*, which relates to the measures covered by the draft articles, reference is made simply to the "expulsion by a State", which covers any and all expulsion measures; no further elaboration is provided, since "expulsion" is defined in draft article 2, subparagraph (a), below. With regard to scope *ratione personae*, that is, the persons covered by the draft articles, it follows from paragraph 1 that the draft articles apply in general to the expulsion of all aliens present in the territory of the expelling State, with no distinction between the various categories of persons involved, for example, aliens lawfully present in the territory of the expelling State, aliens unlawfully present, displaced persons, asylum seekers, persons granted asylum and stateless persons. The term "*alien*" is defined in draft article 2, subparagraph (b).

(3) The draft articles cover the expulsion of both aliens lawfully present and those unlawfully present in the territory of the expelling State, as paragraph 1 of the draft article indicates. The category of aliens unlawfully present in the territory of the expelling State covers both aliens who have entered the territory unlawfully and aliens whose presence in the territory has subsequently become unlawful, primarily because of a violation of the laws of the expelling State governing conditions of stay.[13] Although the draft articles apply in general to the expulsion of aliens present lawfully or unlawfully in the territory of the expelling State, it should be noted at the outset that some provisions of the draft articles draw necessary distinctions between the two categories of aliens, particularly with respect to the rights to which they are entitled.[14] It should be also noted that the inclusion within the scope of the draft articles of aliens whose presence in the territory of the expelling State is unlawful is to be understood in conjunction with the phrase in article 2, subparagraph (a), *in fine*, which excludes from the scope of the draft articles questions concerning non-admission of an alien to the territory of a State.[15]

(4) Paragraph 2 of draft article 1 excludes from the scope of the draft articles certain categories of aliens, namely, aliens enjoying privileges and immunities under international

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[13] Some treaties distinguish between aliens who are lawfully present and those whose status is irregular, but they do not provide a definition of the term "alien unlawfully present" (see, *inter alia*, the International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, No. 14668, art. 13; the Convention relating to the Status of Refugees, United Nations, *Treaty Series*, vol. 189, No. 2545, art. 32); the Convention relating to the Status of Stateless Persons, United Nations, *Treaty Series*, vol. 360, p. 117, art. 31; and the 1955 European Convention on Establishment. See also A/CN.4/565, para. 755, footnotes 1760 to 1763). Some national legislation provides elements of a definition of this category of aliens, although the terms used to refer to them vary from country to country. An alien with irregular status can be understood to mean a person whose presence in the territory of the receiving State is in violation of the legislation of that State concerning the admission, stay or residence of aliens. First of all, an alien's status may be illegal by virtue of the conditions under which he or she entered the State. Hence, any alien who crosses the frontier of the expelling State in violation of its rules concerning the admission of aliens will be considered to have irregular status. Second, the irregular status may be the result not of the conditions of entry but of the conditions of stay in the territory of the expelling State. In such cases, although the alien has crossed the frontier of the State legally and has therefore been lawfully admitted, he or she subsequently fails to comply with the conditions of stay stipulated by the laws of the receiving State. This occurs, for example, when a lawfully admitted alien remains in the territory of the State beyond the period set by the competent authorities of that State. Third, an alien's presence in the expelling State may also be illegal for both of the aforementioned reasons, as would be the case if an alien had entered the receiving State illegally and had not subsequently had his or her status regularized, thus failing to comply with both the conditions of admission and the conditions of stay.

[14] See below, draft articles 6–7, 26–27 and 29 and the commentary thereto.

[15] See below, para. (5) of the commentary to draft article 2.

law. The purpose of the provision is to exclude aliens whose enforced departure from the territory of a State is governed by special rules of international law, such as persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State including, as appropriate, members of their families. In other words, such aliens are excluded from the scope of the draft articles because of the existence of special rules of international law governing the conditions under which they can be compelled to leave the territory of the State in which they are posted for the exercise of their functions.[16]

(5) On the other hand, some other categories of aliens who enjoy special protection under international law, such as refugees, stateless persons and migrant workers and their family members,[17] are not excluded from the scope of the draft articles. It is understood, however, that the application of the provisions of the draft articles to those categories of aliens is without prejudice to the application of the special rules that may govern one aspect or another of their expulsion from the territory of a State.[18] Displaced persons, in the sense of relevant resolutions of the United Nations General Assembly,[19] are also not excluded from the scope of the draft articles.

### Article 2
### Use of terms

For the purposes of the present draft articles:

(a) "expulsion" means a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State;

(b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

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[16] See in particular the rules set out in the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961, United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95), the Vienna Convention on Consular Relations of 1963 (Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261) and the Convention on Special Missions (New York, 8 December 1969, United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 235).

[17] See in particular the rules set out in the 1951 Convention relating to the Status of Refugees, (Geneva, 28 July 1951. United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150), the Convention relating to the Status of Stateless Persons (New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990, United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3).

[18] In this sense, see below the "without prejudice" clauses concerning refugees and stateless persons contained in draft articles 6 and 7.

[19] If a displaced person is by force of circumstances in a foreign territory, outside his or her State of origin or nationality, he or she would be in a situation comparable to that of a refugee. However, displaced persons cannot be assimilated to refugees, even though they generally have the same need for protection. The distinction between the two situations lies in the reasons for taking refuge in a foreign country. Displaced persons who are outside the territory of their country of origin or nationality are in that situation for reasons other than those set out in the definition of "refugee" in international law: they are outside their country because of natural or man-made disasters. The category of displaced persons essentially consists of victims of such disasters, who are commonly known as "ecological" or "environmental" refugees. It is these persons whom the General Assembly has had in mind since 1977 when referring to "refugees and displaced persons." See, e.g., General Assembly resolution 59/170 of 20 December 2004, para. 10.

**Commentary**

(1) Draft article 2 defines two key terms, "expulsion" and "alien", for the purposes of the present draft articles.

(2) Subparagraph (a) provides a definition of "expulsion". The definition reflects the distinction between, on the one hand, a formal act by which a State orders and thereby compels an alien to leave its territory (regardless of what that act may be called under internal law) and, on the other hand, conduct attributable to that State which produces the same result.[20] The Commission thought it appropriate to include both types of cases in the definition of "expulsion" for purposes of the draft articles. It should also be clarified that draft article 2 merely provides a definition of "expulsion" and does not prejudge in any way the question of the lawfulness of the various means of expulsion to which it refers. Means of expulsion that do not take the form of a formal act are also included in the definition of expulsion within the meaning of the draft articles. They may fall under the regime of prohibition of "disguised expulsion" set out in draft article 10.

(3) The proviso that the formal act or conduct constituting expulsion must be attributable to the State is to be understood in the light of the criteria of attribution to be found in Chapter II of Part One of the articles on the responsibility of States for internationally wrongful acts.[21] The same criteria of attribution as those defined in the latter articles must accordingly be applied in determining whether an expulsion should be considered the act of a State in accordance with international law.

(4) Conduct — other than the adoption of a formal decision — that could result in expulsion may take the form of either an action or an omission on the part of the State. Omission might in particular consist of tolerance towards conduct directed against the alien by individuals or private entities, for example, if the State failed to appropriately protect an alien from hostile acts emanating from non-State actors.[22] What appears to be the determining element in the definition of expulsion is that, as a result of either a formal act or conduct — active or passive — attributable to the State, the alien in question is *compelled* to leave the territory of that State.[23] In addition, in order to conclude that there has been expulsion as a result of *conduct* (that is, without the adoption of a formal decision), it is essential to establish the intention of the State in question, by means of that conduct, to bring about the departure of the alien from its territory.[24]

(5) For the sake of clarity, the Commission thought it useful to specify, in the second clause of subparagraph (a), that the concept of expulsion within the meaning of the draft

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[20] In the domestic law of most States, expulsion is a legal act by the State, taking the form of a administrative act, since it is a decision of administrative authorities. It is a formal act that may be contested before the courts of the expelling State, since expulsion is a procedural process. One should also consider that expulsion occurs even in the absence of a formal legal act, as discussed below in the commentary to draft article 10.

[21] See *Yearbook ... 2001*, vol. II (Part Two), pp. 38–54.

[22] See below, draft article 10 and the commentary thereto.

[23] Expulsion is never an act or event requested by the expelled person, nor is it an act or event to which the expelled person consents. It is a formal measure or a situation of irresistible force that compels the person in question to leave the territory of the expelling State. The formal measure ordering the expulsion is an injunction and hence a legal constraint, while the execution of expulsion is a constraint in that it is physically experienced as such. This element of constraint is important in that it distinguishes expulsion from normal or ordinary departure of the alien from the territory. This is the element that arouses the attention or interest not only of the State of destination of the expelled person but also of third States with respect to the situation thus created, to the extent that the exercise of this incontestable right of a State places at issue the protection of fundamental human rights.

[24] See below, paragraphs (3) to (7) of the commentary to draft article 10.

articles did not cover extradition of an alien to another State, surrender to an international criminal court or tribunal or the non-admission of an alien to a State. With respect to non-admission, it should be explained that, in some legal regimes, the term "return (*refoulement*)" is sometimes used instead of "non-admission". For the sake of consistency, the present draft articles use the latter term in cases where an alien is refused entry. The exclusion relates to the refusal by the authorities of a State — usually the authorities responsible for immigration and border control — to allow an alien to enter the territory of that State. On the other hand, the measures taken by a State to compel an alien already present in its territory, even if unlawfully present, to leave it are covered by the concept of "expulsion" as defined in draft article 2, subparagraph (a). This distinction should be understood in the light of the definition of the scope *ratione personae* of the draft articles, which includes both aliens lawfully present in the territory of the expelling State and those unlawfully present.[25] Moreover the exclusion of matters relating to non-admission from the scope of the draft articles is without prejudice to the rules of international law relating to refugees. That reservation is explained by draft article 6, subparagraph (b), which references the prohibition against return (*refoulement*) within the meaning of article 33 of the Convention on the Status of Refugees of 28 July 1951[26] and hence inevitably touches on questions of admission.

(6) Draft article 2, subparagraph (b), defines an "alien" as an individual who does not have the nationality of the State in whose territory the individual is present. The definition covers both individuals with the nationality of another State and individuals without the nationality of any State, that is, stateless persons.[27] Based on that definition, it follows that an individual who has the nationality of the State in whose territory the individual is present cannot be considered an alien with regard to that State, even if he or she possesses one or more other nationalities, and even if it happens that one of those other nationalities can be considered predominant, in terms of an effective link, *vis-à-vis* the nationality of the State in whose territory the individual is present.

(7) The definition of "alien" for the purposes of the draft articles is without prejudice to the right of a State to accord certain categories of aliens special rights with respect to expulsion by allowing them, under its internal law, to enjoy in that regard a regime similar to or the same as that enjoyed by its nationals. Nonetheless, any individual who does not have the nationality of the State in whose territory that individual is present should be considered an alien for purposes of the draft articles, and his or her expulsion from that territory is subject to the present draft articles.

### Article 3
### Right of expulsion

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.

### Commentary

(1) The first sentence of draft article 3 sets out the right of a State to expel an alien from its territory. That right is uncontested in practice as well as in case-law and writings. The right to expel is not conferred on a State by some external rule; it is a inherent right of the State, flowing from its sovereignty. This right has been recognized in particular in a number

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[25] See above, paragraphs (2) and (3) of the commentary to draft article 1.

[26] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150.

[27] With regard to stateless persons, see draft article 7 below.

of arbitral awards and decisions of claims commissions[28] and in various decisions of regional courts and commissions.[29] Moreover, it is enshrined in the internal law of most States.

(2) The second sentence of draft article 3 is a reminder that the exercise of this right of expulsion is regulated by the present draft articles, without prejudice to other applicable rules of international law. The reference to "other" applicable rules of international law does not mean that the draft articles, as a whole, reflect current international law in the sense of treaty law. They are both a work of codification of international law and an exercise in its progressive development. Some of the rules contained therein are established by certain treaty regimes or firmly established in customary international law, although some of them constitute progressive development of international law. In addition, the specific mention of human rights is justified by the importance that respect for human rights assumes in the context of expulsion, an importance also underlined by the many provisions of the draft articles devoted to various aspects of the protection of the human rights of aliens subject to expulsion. Among the "other applicable rules of international law" to which a State's exercise of its right to expel aliens is subject and which are not addressed in specific provisions of the draft articles, it is worth mentioning in particular some of the traditional limitations that derive from the rules governing the treatment of aliens, including the prohibitions against arbitrariness, abuse of rights and denial of justice. Other applicable rules also include rules in human rights instruments concerning derogation in times of emergency. It should be emphasized in this connection that most of the obligations of States under these instruments are not absolute in nature, and that derogations are possible in certain emergency situations, for example, where there is a public emergency threatening the life of the nation. Draft article 3 thus preserves the possibility for a State to adopt measures that derogate from certain requirements of the present draft articles insofar as it is consistent with its other obligations under international law.

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[28] See, for example, *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. IV, pp. 3347–3348; the *Maal* case, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 731; the *Boffolo* case, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 528, 529, 531 and 532; the *Oliva* case, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 608 (Ralston, Umpire); the *Paquet* case, Mixed Claims Commission Belgium-Venezuela, 1903, *United Nations, Reports of International Arbitral Awards*, vol. IX, p. 325 (Filtz, Umpire); and *Yeager v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 92–113.

[29] With respect to the European Court of Human Rights, see in particular *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, para. 43. See also *Vilvarajah and others v. United Kingdom*, Judgment (Merits), 30 October 1991, Applications Nos. 13163/87, 13164/87, 13165/87 and 13448/87, para. 102; *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 73; *Ahmed v. Austria*, Judgment (Merits and Just Satisfaction), 17 December 1996, Application No. 25964/94, para. 38; *Bouchelkia v. France*, Judgment (Merits), 29 January 1997, Application No. 23078/93, para. 48; and *H.L.R. v. France*, Judgment (Merits), 29 April 1997, Application No. 24573/94, para. 33. With regard to the African Commission on Human and Peoples' Rights, see in particular communication No. 159/96, *Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal et Association Malienne des Droits de l'Homme v. Angola*, Eleventh Annual Activity Report, 1997–1998, para. 20.

### Article 4
### Requirement for conformity with law

An alien may be expelled only in pursuance of a decision reached in accordance with law.

**Commentary**

(1) Draft article 4 sets out a fundamental condition to which a State's exercise of its right to expel aliens from its territory is subject. That condition is the adoption of an expulsion decision by the expelling State in accordance with law.

(2) The requirement that an expulsion decision must be made in accordance with law has, first of all, the effect of prohibiting a State from engaging in conduct intended to compel an alien to leave its territory without notifying the alien of a decision in that regard. The prohibition of any form of disguised expulsion is contained in draft article 10, paragraph 1.

(3) The requirement of conformity with the law follows logically from the fact that expulsion is to be exercised within the framework of law. The State's prerogative of regulating conditions of expulsion on its territory within the limits of international law entails the obligation to comply with the rules it has laid down or subscribed to in this area.[30] It is thus not surprising to note the wide agreement in the legislation of many States on the minimum requirement that the expulsion procedure must conform to the provisions of law.[31] Moreover, the requirement is well established in international human rights law, both universal and regional. At the universal level, it appears in article 13 of the International Covenant on Civil and Political Rights[32] (with respect to aliens lawfully present on the territory of the expelling State); in article 22, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;[33] in article 32, paragraph 2, of the Convention relating to the Status of Refugees;[34] and in article 31, paragraph 2, of the Convention relating to the Status of Stateless Persons.[35] At the regional level, it is relevant to mention article 12, paragraph 4,

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[30] The two maxims of Roman law that apply in this case are: for the State's own rules, *patere legum* or *patere regulam quam fecisti*, and for the rules of international law, *pacta sunt servanda*.

[31] See, for example, article 14, paragraph 5, of the Czech Republic's Charter of Fundamental Rights and Freedoms, article 58, paragraph 2, of the Constitution of Hungary, article 23, paragraph 5, of the Constitution of the Slovak Republic or section 9 of the Constitution of Finland.

[32] The provision reads as follows: "An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law ..." (International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171).

[33] The provision reads as follows: "Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law" (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, 18 December 1990, United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3).

[34] The provision states, in particular, that the expulsion of a refugee lawfully in the territory of a Contracting State "shall only be in pursuance of a decision reached in accordance with due process of law ..." (Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150).

[35] This provision has essentially the same wording, *mutatis mutandis*, as the provision quoted in the preceding footnote concerning refugees (Convention relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117).

of the African Charter on Human and Peoples' Rights;[36] article 22, paragraph 6, of the American Convention on Human Rights (Pact of San José);[37] article 1, paragraph 1, of Protocol No. 7 to the European Convention on Human Rights;[38] and article 26, paragraph 2, of the Arab Charter on Human Rights,[39] which impose the same requirement with respect to aliens lawfully present in the territory of the expelling State.

(4) The requirement for conformity with law must apply to any expulsion decision, irrespective of whether the presence of the alien in question in the territory of the expelling State is lawful or not. It is understood, however, that domestic legislation may provide for different rules and procedures for expulsion depending on the lawful or unlawful nature of that presence.[40]

(5) The requirement for conformity with law is quite general, since it applies to both the procedural and the substantive conditions for expulsion.[41] In consequence, its scope is wider than the similar requirement set out in draft article 5, paragraph 2, with regard to the grounds for expulsion.

(6) In its judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice confirmed the requirement for conformity with law as a condition for the lawfulness of an expulsion under international law. Referring, in that context, to article 13 of the International Covenant on Civil and Political Rights and to article 12, paragraph 4, of the African Charter on Human and Peoples' Rights, the Court observed:

> "It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with 'the law', in other words the domestic law applicable in that

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[36] The provision reads as follows: "A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law" (African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217).

[37] The provision reads as follows: "An alien lawfully in the territory of a State party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law" (American Convention on Human Rights (Pact of San José), San José, Costa Rica, 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 143).

[38] The provision reads as follows: "An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law …" (Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, *European Treaty Series*, No. 117).

[39] The provision reads as follows: "No State party may expel a person who does not hold its nationality but is lawfully in its territory, other than in pursuance of a decision reached in accordance with law …" (Charter adopted by the Summit of the League of Arab States at its sixteenth regular session (Tunis, May 2004); entered into force on 15 March 2008; translation from the Office of the United Nations High Commissioner for Human Rights; English version available at http://www.unicef.org/tdad/arabcharterhumanrights.doc).

[40] In this sense, see draft article 26, para. 4, below.

[41] See, in that sense, the opinion of the Steering Committee for Human Rights of the Council of Europe when it states, in connection with article 1, paragraph 1, of Protocol 7 to the European Convention on Human Rights, that expulsion decisions must be taken "by the competent authority in accordance with the provisions of substantive law and with the relevant procedural rules" (Council of Europe, Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 11).

respect. Compliance with international law is to some extent dependent here on compliance with internal law."[42]

(7) Although the requirement for conformity with law is a condition for the lawfulness of any expulsion measure under international law, the question might arise as to the extent of an international body's power of review of compliance with internal law rules in a context like that of expulsion. An international body is likely to be somewhat reticent in that regard. As an example, one might mention the position taken by the Human Rights Committee with respect to the expulsion by Sweden in 1977 of a Greek political refugee suspected of being a potential terrorist. That individual argued before the Committee that the expulsion decision had not been taken "in accordance with law" and therefore was not in compliance with the provisions of article 13 of the Covenant. The Human Rights Committee took the view that the interpretation of internal law was essentially a matter for the courts and authorities of the State party concerned, and that "it was not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question [had] interpreted and applied the internal law correctly in the case before it ..., unless it [was] established that they [had] not interpreted and applied it in good faith or that it [was] evident that there [had] been an abuse of power".[43] The International Court of Justice and the European Court of Human Rights took a similar approach to their own power to assess whether a State had complied with its internal law in a case of expulsion.[44]

### Article 5
### Grounds for expulsion

1. Any expulsion decision shall state the ground on which it is based.

2. A State may only expel an alien on a ground that is provided for by law.

3. The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.

4. A State shall not expel an alien on a ground that is contrary to its obligations under international law.

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[42] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 663, para. 65. Referring to the procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the Court concluded that the expulsion of Mr. Diallo had not been decided "in accordance with law" (*ibid.*, p. 666, para. 73).

[43] Human Rights Committee, communication No. 58/1979 *Anna Maroufidou v. Sweden*, Views adopted on 9 April 1981, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), p. 165, para. 10.1.

[44] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, and *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, para. 58: "Where the Convention refers directly back to domestic law, as in article 5, compliance with such law is an integral part of Contracting States 'engagements' and the Court is accordingly competent to satisfy itself of such compliance where relevant (article 19); the scope of its task in this connection, however, is subject to limits inherent in the logic of the European system of protection, since it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, *inter alia* and *mutatis mutandis*, the *Winterwerp* judgment of 24 October 1979, Series A, No. 33, p. 10, § 46)."

**Commentary**

(1) The question of the grounds for expulsion encompasses several aspects having to do with the statement of the ground for expulsion, the existence of a valid ground and the assessment of that ground by the competent authorities. Draft article 5 deals with those issues.

(2) Draft article 5, paragraph 1, sets out an essential condition under international law, namely, the statement of the ground for the expulsion decision. The duty of the expelling State to indicate the grounds for an expulsion is well-established in international law. It is recognized that while the conditions for admission of aliens into the territory of a State fall under its sovereignty and therefore its exclusive competence, a State may not at will deprive them of their right of residence. As early as 1892, the Institute of International Law was of the view that an act ordering expulsion must "*être motivé en fait et en droit*" [be reasoned in fact and in law].[45] In its judgment on the merits in the *Diallo* case, the International Court of Justice found that the Democratic Republic of the Congo had failed to fulfil this obligation to give reasons and that, throughout the proceedings, it had failed to adduce grounds that might provide "a convincing basis" for Mr. Diallo's expulsion; the Court therefore concluded that the arrest and detention of Mr. Diallo with a view to his expulsion had been arbitrary. In that regard, the Court could not but

> "find not only that the decree itself was not reasoned in a sufficiently precise way ... but that throughout the proceedings, the Democratic Republic of the Congo has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. ... Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter."[46]

In the *Amnesty International v. Zambia* case, the African Commission on Human and Peoples' Rights held that Zambia had violated the right of the alien concerned to receive information by failing to inform him of the reasons for his expulsion. According to the Commission, the fact "that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (article 9 (1))".[47]

(3) Draft article 5, paragraph 2, sets out the fundamental requirement that the ground for expulsion must be provided for by law. The reference to "law" here is to be understood as a reference to the internal law of the expelling State. In other words, international law makes the lawfulness of an expulsion decision dependent on the condition that the decision is based on a ground provided for in the law of the expelling State. The Commission considers that this requirement is implied by the general requirement of conformity with law, set forth in draft article 4.[48] It would be futile to search international law for a list of

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[45] *Règles internationales sur l'admission et l'expulsion des étrangers* [International Regulations on the Admission and Expulsion of Aliens], adopted on 9 September 1892 at the Geneva session of the Institute of International Law, art. 30.

[46] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports* 2010, p. 639, at p. 669, para. 81.

[47] African Commission on Human and Peoples' Rights, Communication No. 212/98, *Amnesty International v. Zambia*, Twelfth Annual Activity Report, 1998–1999, paras. 32 and 33.

[48] See above, para. (5) of the commentary to draft article 4.

valid grounds of expulsion that would apply to aliens in general;[49] it is for the internal law of each State to provide for and define the grounds for expulsion, subject to the reservation stated in paragraph 4 of the draft article, namely, that the grounds must not be contrary to the obligations of the State under international law. In this regard, internal laws may be found to provide for a rather wide variety of grounds for expulsion. It must be noted that violation of internal law on entry and stay (immigration law) constitutes the most common ground for expulsion. This ground provided for in the legislation of many States is permissible under international law; in other words, the unlawfulness of the presence of an alien in the territory of a State can in itself constitute a sufficient ground for expulsion. Moreover, national security and public order are also grounds that are frequently invoked to justify an expulsion.

(4) Paragraph 3 sets out general criteria for the expelling State's assessment of the ground for expulsion. The assessment shall be made in good faith and reasonably, in the light of all the circumstances. The gravity of the facts, the conduct of the alien in question and the current nature of the threat to which the facts give rise are mentioned as among the factors to be taken into consideration, where relevant, by the expelling State. The criterion of "the current nature of the threat" mentioned *in fine* is particularly relevant when the ground for expulsion is a threat to national security or public order.

(5) The purpose of draft article 5, paragraph 4, is simply to recall the prohibition against expelling an alien on a ground contrary to the expelling State's obligations under international law. The prohibition would apply, for example, to expulsion based on a ground that was discriminatory in the sense of draft article 14 below.[50] It should be specified that the expression "to its obligations under international law" does not mean that a State may interpret such obligations in a restrictive manner, to avoid other obligations under international law that are opposable to it.

## Part Two
## Cases of prohibited expulsion

### Article 6
### Prohibition of the expulsion of refugees

The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules:

(a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;

(b) a State shall not expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

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[49] However, see below, draft article 6, subparagraph (a), and draft article 7, which limit the grounds for expulsion of refugees and stateless persons to "grounds of national security or public order", thus reproducing the rules contained in the relevant treaty instruments.

[50] On the lawfulness of grounds for expulsion under international law, see also, below, draft article 11 (Prohibition of expulsion for the purpose of confiscation of assets) and draft article 12 (Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure).

**Commentary**

(1) Draft article 6 deals with the expulsion of refugees, which is subject to restrictive conditions by virtue of the relevant rules of international law. It contains a "without prejudice" clause aimed at ensuring the continued application to refugees of the rules concerning their expulsion, as well as of any more favourable rules or practice on refugee protection. In particular, subparagraphs (a) and (b) of draft article 6 recall two particularly important rules concerning the expulsion or return (*refoulement*) of refugees.

(2) The term "refugee" should be understood not only in the light of the general definition contained in article 1 of the Convention relating to the Status of Refugees of 28 July 1951,[51] as amended by article 1 of the Protocol relating to the Status of Refugees of 31 January 1967,[52] which eliminated the geographic and temporal limitations of the 1951 definition, but also having regard to subsequent developments in the matter, including the practice of the Office of the United Nations High Commissioner for Refugees (UNHCR).[53] In that regard, the broader definition of "refugee" adopted in the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969 merits particular mention.[54]

(3) The terms "rules of international law relating to refugees" should be understood as referring to all of the treaty rules at the universal, regional and subregional levels that relate to refugees, as well as to relevant customary rules, to which the draft articles are without prejudice. Draft article 6 refers, in particular, to the exclusion clause in article 1, subparagraph (F) of the Convention relating to the Status of Refugees[55] and the rules on procedural conditions applying to the expulsion of a refugee such as is contained, in particular, in article 32, paragraph 2, of that Convention.[56] It likewise relates to the provisions of article 32, paragraph 3, of the 1951 Convention[57] which require the expelling State to allow a refugee or stateless person a reasonable period within which to seek legal

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[51] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150, art. 1.

[52] Protocol relating to the Status of Refugees, New York, 31 January 1967, United Nations, *Treaty Series*, vol. 606, No. 8791, p. 267, art. 1.

[53] See UNHCR, *Handbook on Procedures for Determining Refugee Status*, Geneva, UNHRC, 1979, paragraph 28 of which reads as follows: "Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."

[54] "OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45.

[55] This provision reads as follows: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

[56] This provision reads as follows: "The expulsion of such a refugee [namely, a refugee lawfully in the territory of the expelling State] shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."

[57] This provision reads as follows: "The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

admission into another country, and which likewise accord that State the right to apply during that period such internal measures as it might deem necessary.

(4) Moreover, draft article 6 adds that the present draft articles are without prejudice to more favourable rules or practice on refugee protection. In addition to the rules of international law, national practice in this area is of particular importance in that it can be the source of important rights for refugees. This means, *inter alia*, the pertinent rules in the internal law of the expelling State, as long as they are not incompatible with the State's international obligations or with declarations made by the expelling State pursuant to its treaty obligations.

(5) Draft article 6, subparagraph (a), reproduces the wording of article 32, paragraph 1, of the Convention relating to the Status of Refugees of 28 July 1951. The rule contained in that paragraph, which applies only to refugees lawfully in the territory of the expelling State, limits the grounds for expulsion of such refugees to those relating to reasons of national security or public order.

(6) The prohibition of expulsion of a refugee lawfully in the territory of the expelling State for any grounds other than national security or public order has also been extended to any refugee who, being unlawfully in the territory of the State, has applied for refugee status, as long as this application is under consideration. However, such protection can be envisaged only for so long as the application is pending. This protection, which reflects a trend in the legal literature[58] and finds support in the practice of some States[59] and of UNHCR,[60] would constitute a departure from the principle whereby the unlawfulness of the presence of an alien in the territory of a State can in itself justify expulsion of the alien. The protection might be set aside only in cases where the manifest intent of the application for refugee status was to thwart an expulsion decision likely to be handed down against the individual concerned. It concerns only individuals who, while not enjoying the status of refugee in the State in question, did meet the definition of "refugee" within the meaning of the 1951 Convention or, in some cases, other relevant instruments, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and should therefore be regarded as refugees under international law. Any individual who does not correspond to the definition of refugee within the meaning of the relevant legal instruments is ineligible to enjoy the protection recognized in draft article 6 and can be expelled on grounds other than those stipulated in subparagraph (a), including on the sole ground of the unlawfulness of his or her presence in the territory of the expelling State. In any event,

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[58] See, in particular, Elihu Lauterpacht and Daniel Bethlehem, "Complementary forms of protection", *Global Consultations on International Protection*, UNHCR document EC/GC/01/18 of 4 September 2001, para. 11 (g).

[59] French practice is particularly interesting in this regard. Unlike the 1951 Convention, which simply says that the Contracting States may not expel or return (*refouler*) a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened," according to the French Constitutional Council, the fourth preambular paragraph of the French Constitution of 27 October 1946, to which the Constitution in force, of 4 October 1958, refers, implies, in general terms, that an alien claiming refugee status is allowed to remain provisionally in French territory until a ruling has been made on his or her application (Constitutional Council, Decision No. 93-325 DC of 13 August 1993, *Journal officiel*, 18 August 1993, pp. 11722 *et seq.*). This solution is directly inspired by the one used by the Assembly of the French Council of State which, on two occasions, has recognized that an asylum seeker claiming refugee status should be allowed to remain provisionally in French territory until the French Office for the Protection of Refugees and Stateless Persons or, where applicable, the Refugee Appeals Commission, has ruled on his or her application (Council of State, Assembly, 13 December 1991, *M. Nkodia and Prefect of Hérault v. Dakoury*, *Revue française de droit administratif*, January–February 1992, pp. 90–103).

[60] See *supra* note 53.

article 6 is without prejudice to the right of a State to expel, for reasons other than those mentioned in subparagraph (a), an alien whose application for refugee status is manifestly abusive.

(7) Draft article 6, subparagraph (b), which concerns the obligation of *non-refoulement*, combines paragraphs 1 and 2 of article 33 of the 1951 Convention. Unlike the other provisions of the draft articles, which do not cover the situation of non-admission of an alien to the territory of a State,[61] draft article 6, subparagraph (b), provides that these draft articles are without prejudice to that situation as well, as indicated by the opening phrase: "A State shall not expel or return (*refouler*) …". Moreover, unlike the protection stipulated in subparagraph (a), the protection mentioned in subparagraph (b) applies to all refugees, regardless of whether their presence in the receiving State is lawful or unlawful. It should also be emphasized that the mention of this specific obligation of *non-refoulement* of refugees is without prejudice to the application to them of the general rules prohibiting expulsion to certain States as contained in draft articles 23 and 24.

### Article 7
### Rules relating to the expulsion of stateless persons

The present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

**Commentary**

(1) As is the case for refugees, stateless persons are protected under the relevant rules of international law by a favourable regime that places limits on their expulsion. Article 1 of the Convention relating to the Status of Stateless Persons of 28 September 1954,[62] defines the term "stateless person" as "a person who is not considered as a national by any State under the operation of its law."[63]

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[61] See above draft article 2, subpara. (a), *in fine*.

[62] Convention relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117.

[63] This provision reads as follows:

> "*Article 1 – Definition of the term stateless person*
>
> 1. For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.
>
> 2. This Convention shall not apply:
>
> (i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;
>
> (ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;
>
> (iii) To persons with respect to whom there are serious reasons for considering that:
>
> (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
>
> (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

(2) Draft article 7 consists of a "without prejudice" clause aimed at ensuring the continued application to stateless persons of the rules concerning their expulsion. It relates, in particular, to the rules on procedural conditions applying to the expulsion of a stateless person as contained in article 31, paragraph 2, of the 1954 Convention.[64] It likewise relates to the provisions of article 31, paragraph 3, of the 1954 Convention[65] which require the expelling State to allow a stateless person a reasonable period within which to seek legal admission into another country, and which likewise accord that State the right to apply during that period such internal measures as it might deem necessary.

(3) By analogy with subparagraph (a) of draft article 6 concerning refugees, draft article 7 is patterned after article 31, paragraph 1, of the Convention relating to the Status of Stateless Persons. Here, too, the limitation on the grounds for expulsion applies only to stateless persons lawfully present in the territory of the expelling State.

(4) Draft article 7 does not contain a parallel provision to subparagraph (b) of draft article 6 concerning refugees, which refers to the obligation of *non-refoulement*. Stateless persons, like any other alien subject to expulsion, are entitled to the protection recognized by draft articles 23 and 24 below, which apply to aliens in general.

### Article 8
### Deprivation of nationality for the purpose of expulsion

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

**Commentary**

(1) Draft article 8 concerns the specific situation in which a State might deprive a national of his or her nationality, and thus makes that national an alien, for the sole purpose of expelling him or her. Such a deprivation of nationality, insofar as it has no other justification than the State's desire to expel the individual, would be abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights.[66] For this reason, draft article 8 sets forth the prohibition of the deprivation of nationality for the sole purpose of expulsion.

(2) It would no doubt have been simpler to state, for example, that "[a] State may not deprive a national of his or her nationality for the sole purpose of expulsion." However, the

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(c) They have been guilty of acts contrary to the purposes and principles of the United Nations."

[64] This provision reads as follows: "The expulsion of such a stateless person [namely, a stateless person lawfully in the territory of the expelling State] shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."

[65] This provision reads as follows: "The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

[66] General Assembly resolution 217 (III) A of 10 December 1948. Article 15 of the Universal Declaration of Human Rights reads as follows: "1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." See also art. 20, para. 3, of the American Convention on Human Rights ("No one shall be arbitrarily deprived of his nationality or of the right to change it."), as well as art. 29, para. 1, of the Arab Charter on Human Rights ("Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality").

Commission preferred the current wording because the phrase "shall not make its national an alien, by deprivation of nationality", in addition to linking the specific situation covered in the draft article to the topic of the expulsion of aliens, is expository in nature: it describes how a national of a State may become an alien in that State by means of deprivation of his or her nationality when the sole aim of that State is to expel the person concerned.

(3) It should be clarified, however, that draft article 8 does not purport to limit the normal operation of legislation relating to the grant or loss of nationality; consequently, it should not be interpreted as affecting a State's right to deprive an individual of its nationality on a ground that is provided for in its legislation. Similarly, draft article 8 does not relate to situations when an individual voluntarily renounces his or her nationality.

(4) Furthermore, draft article 8 does not address the issue of the expulsion by a State of its own nationals, something that falls outside the scope of the draft articles, which deal solely with the expulsion of aliens.

### Article 9
### Prohibition of collective expulsion

1. For the purposes of the present draft article, collective expulsion means expulsion of aliens, as a group.

2. The collective expulsion of aliens is prohibited.

3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

**Commentary**

(1) Paragraph 1 of draft article 9 contains a definition of collective expulsion for the purposes of the present draft articles. According to this definition, collective expulsion is understood to mean the expulsion of aliens "as a group". This criterion is informed by the case-law of the European Court of Human Rights.[67] It is a criterion that the Special

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[67] See *Vedran Andric v. Sweden*, Decision as to the admissibility of Application No. 45917/99, 23 February 1999, para. 1: "The Court finds that collective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. Moreover, the fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis …" See also *Čonka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 59: "The Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (see *Andric*, cited above)". See also *Case of Georgia v. Russia (I)*, Judgment (Merits), 3 July 2014, Application No. 13255/07, para. 167: "The Court reiterates its case-law according to which collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken following, and on the basis of, a reasonable and objective examination of the particular case of each individual alien of the

Rapporteur on the rights of non-citizens of the Commission on Human Rights, Mr. David Weissbrodt, had also endorsed in his final report of 2003.[68] Only the "collective" aspect is addressed in this definition, which must be understood in the light of the general definition of expulsion contained in draft article 2, subparagraph (a).

(2) Paragraph 2 sets out the prohibition of the collective expulsion of aliens. This prohibition is expressly embodied in several international human rights treaties. At the universal level, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families expressly prohibits the collective expulsion of these persons, providing, in article 22, paragraph 1, that "[m]igrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually." At the regional level, the American Convention on Human Rights provides in article 22, paragraph 9, that "[t]he collective expulsion of aliens is prohibited". Article 4 of Protocol No. 4 to the European Convention on Human Rights[69] stipulates that "[c]ollective expulsion of aliens is prohibited". Similarly, article 12, paragraph 5, of the African Charter on Human and Peoples' Rights provides that "[t]he mass expulsion of non-nationals shall be prohibited" and in the same provision defines this form of expulsion as "that which is aimed at national, racial, ethnic or religious groups". Lastly, in article 26, paragraph 2, *in fine*, the Arab Charter on Human Rights states that "[c]ollective expulsion is prohibited under all circumstances".

(3) Article 13 of the International Covenant on Civil and Political Rights does not expressly prohibit collective expulsion. However, the Human Rights Committee expressed the opinion that such a form of expulsion would be contrary to the procedural guarantees to which aliens subject to expulsion are entitled. In its General Comment No. 15 on the position of aliens under the Covenant, the Committee stated the following:

> "Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out 'in pursuance of a decision reached in accordance with law', its purpose is clearly to prevent arbitrary expulsions. *On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for*

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group' (see *Čonka*, cited above, § 59). The Court has subsequently specified that 'the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis' (see, among other authorities, *Sultani* [*v. France*, Judgment, 20 September 2007, Application No. 45223/05] § 81, and *Hirsi Jamaa and Others* [*v. Italy*, Judgment, 23 February 2012, Application No. 27765/09], §184). That does not mean, however, that where there has been a reasonable and objective examination of the particular case of each individual 'the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4' (see *Čonka*, cited above, *ibid.*)."

[68] In it, the Special Rapporteur states the following: "Any measure that compels non-citizens, as a group, to leave a country is prohibited except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-citizen in the group." The rights of non-citizens, Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283 (E/CN.4/Sub.2/2003/23), 26 May 2003, para. 11 (citing the European Court of Human Rights, *Čonka v. Belgium*, *op. cit.*). In its case-law, the European Court of Human Rights speaks of a "reasonable and objective examination". This phrase was not used in the final version of draft article 9 in order to keep the concomitant expulsion of more than one alien under the general legal regime on expulsion established by the present draft articles.

[69] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *European Treaty Series*, No. 46.

> *collective or mass expulsions.* This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require. Discrimination may not be made between different categories of aliens in the application of article 13."[70] (emphasis added)

(4) The prohibition of the collective expulsion of aliens set out in paragraph 2 of the present draft article should be read in the light of paragraph 3, which elucidates it by specifying the conditions under which the members of a group of aliens may be expelled concomitantly without such a measure being regarded as a collective expulsion within the meaning of the draft articles. Paragraph 3 states that such an expulsion is permissible provided that it takes place after and on the basis of an assessment of the particular case of each individual member of the group *in accordance with the present draft articles*. The latter phrase refers in particular to draft article 5, paragraph 3, which states that the ground for expulsion must be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.[71]

(5) Paragraph 4 of draft article 9 is a "without prejudice" clause referring to situations of armed conflict. This clause, which relates in general terms to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State aims to avoid any incompatibility between the rights and obligations of the State set out in the present draft articles and those under international humanitarian law.

### Article 10
### Prohibition of disguised expulsion

1. Any form of disguised expulsion of an alien is prohibited.

2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intending to provoke the departure of aliens from its territory other than in accordance with the law.

#### Commentary

(1) Draft article 10 is intended to indicate that a State does not have the right to utilize disguised or indirect means or techniques in order to bring about the same result that it could obtain through the adoption of a expulsion decision, namely to compel an alien to depart from its territory. In the legal literature in English,[72] the term "constructive expulsion" is sometimes used to designate methods of expulsion other than the adoption of a decision as such. The Commission considered, however, that it was difficult to find a

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[70] Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 10.

[71] See above, paragraph (4) of the commentary to draft article 5.

[72] See, *inter alia*, Ruth L. Cove, "State Responsibility for Constructive Wrongful Expulsion of Foreign Nationals", *Fordham International Law Journal*, vol. 11, 1987–1988, pp. 802–838.

satisfactory equivalent of the term "constructive expulsion" in other languages, particularly French, as the term might carry an undesirable positive connotation. Consequently, the Commission opted in this context for the term "disguised expulsion".

(2) Paragraph 1 of draft article 10 sets out the prohibition of any form of disguised expulsion, thus indicating that such conduct is prohibited under international law regardless of the form it takes or the methods employed. This is because, in essence, disguised expulsion infringes the human rights of the alien in question, including the procedural rights referred to in Part Four of the draft articles.

(3) Draft article 10, paragraph 2, contains a definition of disguised expulsion that focuses on what characterizes it. The specificity lies in the fact that the expelling State, without adopting a formal expulsion decision, engages in conduct intended to produce and actually producing the same result, namely the forcible departure of an alien from its territory. The element of *détournement* is conveyed by the adverb "indirectly" that qualifies the occurrence of an alien's departure as a result of the conduct of the State. The last phrase of paragraph 2 is intended to indicate that the notion of "disguised expulsion" covers only situations in which the forcible departure of an alien is the *intentional result* of an action or omission attributable to the State. The State's intention to provoke an alien's departure from its territory, which is inherent in the definition of expulsion in general, thus remains a decisive factor when expulsion occurs in a disguised form. In addition, paragraph 2 of the draft article relates only to actions or omissions of a State intended to provoke an alien's departure in a way other than in accordance with the law. This prohibition does not cover, in particular, situations when expulsion results from a decision adopted in conformity with the law and on grounds in accordance with international law.[73]

(4) The definition of disguised expulsion, based on the elements of "compulsion" and "intention", appears consistent with the criteria applied in this regard by the Iran-United States Claims Tribunal, which had before it a number of claims relating to situations of the same nature as those envisaged in draft article 10. The two essential elements of the notion of "disguised expulsion" that emerge from the relevant decisions of the Tribunal have been summarized as follows:

> "Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of state responsibility."[74]

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[73] See in particular draft articles 4 and 5 above, concerning the requirement for conformity with law and grounds for expulsion, respectively.

[74] D.J. Harris, *Cases and Materials on International Law*, 7th ed. (London, Sweet & Maxwell, 2010), p. 470 (commenting on the Iran-United States Claims Tribunal cases relating to disguised expulsion). Concerning this case-law, see also Giorgio Gaja "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, pp. 283–314, particularly pp. 289–290, which refer to the following decisions of the Tribunal: *Short v. Islamic Republic of Iran*, Award of 14 July 1987, *Iran-United States Claims Tribunal Reports*, vol. 16 (1987-III), pp. 85–86; *International Technical Products Corporation v. Islamic Republic of Iran*, Award of 19 August 1985, *Iran-United States Claims Tribunal Reports*, vol. 9 (1985-II), p. 18; and *Rankin v. Islamic Republic of Iran*, Award of 3 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17 (1987-IV), pp. 147–148. See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (London/New York, Routledge, 1997), p. 262; John R. Crook, "Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience", *American Journal of International Law*, vol. 83, 1989, pp. 278–311 at pp. 308 and 309; and R. Cove, *op. cit.*, pp. 802–838.

(5) The approach taken by the Eritrea-Ethiopia Claims Commission seems to follow the same lines. The Commission considered the claim of Ethiopia that Eritrea was responsible for "indirect" or "constructive" expulsions of Ethiopians that were contrary to international law. The Commission rejected certain claims after finding that the Ethiopians in question had not been expelled by the Government of Eritrea or made to leave by Government policy; instead, they had left the country for other reasons, such as economic factors or upheavals brought about by war, for which Eritrea could not be held responsible. The Commission noted that free consent seemed to have prevailed in these situations.[75]

In considering subsequent expulsions, the Eritrea-Ethiopia Claims Commission emphasized the high legal threshold for responsibility based on the jurisprudence of the Iran-United States Claims Tribunal. The Commission concluded that Ethiopia had failed to meet the high legal threshold for proof of such claims as follows:

> "126. Ethiopia also contended that those who left between May 2000 and December 2000 were victims of unlawful indirect or constructive expulsion. The Parties expressed broadly similar understanding of the law bearing on these claims. Both cited the jurisprudence of the Iran-U.S. Claims Tribunal, which establishes a high threshold for liability for constructive expulsion. That Tribunal's constructive expulsion awards require that those who leave a country must have experienced dire or threatening conditions so extreme as to leave no realistic alternative to departure. These conditions must result from actions or policies of the host government, or be clearly attributable to that government. Finally, the government's actions must have been taken with the intention of causing the aliens to depart.
>
> 127. The evidence does not meet these tests. Post-war Eritrea was a difficult economic environment for Ethiopians and Eritreans both, but the Eritrean Government did not intentionally create generalized economic adversity in order to drive away Ethiopians. The Commission notes that the Government of Eritrea took actions in the summer of 2000 that were detrimental to many Ethiopians' economic interests and that there was anti-Ethiopian public opinion and harassment. Nevertheless, many Ethiopians in Eritrea evidently saw alternatives to departure and elected to remain or to defer their departures. Given the totality of the record, the Commission concludes [that the claim of wide-scale constructive expulsion does not meet the high legal threshold for proof of such a claim."[76]

(6) Among the acts of a State that might constitute disguised expulsion within the meaning of draft article 10 should be included support or tolerance shown by the State towards acts committed individually or collectively by private persons.[77] Support or

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[75] *Partial Award, Civilians Claims, Ethiopia's Claim 5*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 91–95, United Nations, *Reports of International Arbitral Awards*, vol. XXVI, pp. 277–278.

[76] *Ibid.*, pp. 285–286 [citing Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal*, pp. 343–365 (1998); George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 464–471 (1996)].

[77] See in this connection the Declaration of Principles of International Law on Mass Expulsion by the International Law Association. The definition of the term "expulsion" contained in the Declaration also covers situations in which the forcible departure of individuals is achieved by means other than a formal decision by the authorities of the State. It encompasses situations in which a State aids, abets or tolerates acts committed by its citizens with the intention of provoking the departure of individuals from the territory of the State. According to the Declaration,

> "'expulsion' in the context of the present Declaration may be defined as an act, or failure to act, by a State with the intended effect of forcing the departure of persons, against

tolerance shown by a State towards acts committed by private persons could fall within the scope of the prohibition of disguised expulsion if such support or tolerance constituted an "action or omission attributable to the State … intending to provoke the departure of aliens from its territory". In other words, such support or tolerance on the part of the expelling State must be assessed according to the criterion of the specific intention to which the last phrase of paragraph 2 refers. It is understood that a particularly high threshold should be set for this purpose when it is a matter of mere tolerance unaccompanied by definite actions of support on the part of the State for the acts of private persons. The criteria for the attribution of conduct to a State are the same as those contained in chapter II of the articles on the responsibility of States for internationally wrongful acts adopted in 2001.[78]

(7) The situation of support or tolerance towards acts of private persons could involve acts committed by either nationals of the State in question or aliens present in the territory of that State. That is what is meant by the phrase "its nationals or other persons", which, moreover, covers both natural and legal persons.

### Article 11
### Prohibition of expulsion for purposes of confiscation of assets

The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

### Commentary

(1) Draft article 11 sets out the prohibition of confiscatory expulsions, that is, expulsions with the aim of unlawfully depriving an alien of his or her assets. The unlawful confiscation of property may well be the undeclared aim of an expulsion. "For example, the 'right' of expulsion may be exercised ... in order to expropriate the alien's property ... In such cases the exercise of the power cannot remain untainted by the ulterior and illegal purposes."[79] Such expulsions, to which some States have resorted in the past,[80] are unlawful from the perspective of contemporary international law. Aside from the fact that the grounds for such expulsions appear unsound,[81] it must be said that they are incompatible with the fundamental principle set out in the Declaration on the Human Rights of

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their will from its territory for reason of race, nationality, membership of a particular social group or political opinion;

… 'a failure to act' may include situations in which authorities of a State tolerate, or even aid and abet, acts by its citizens with the intended effect of driving groups or categories of persons out of the territory of that State, or where the authorities create a climate of fear resulting in panic flight, fail to assure protection to those persons or obstruct their subsequent return".

International Law Association, Declaration of Principles of International Law on Mass Expulsion, 62nd Conference of the International Law Association, Seoul, 24–30 August 1986, *Conference Report 1986*, p. 13.

[78] *Yearbook … 2001*, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I)/Corr.4.

[79] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford, Clarendon Press, 1978), p. 209.

[80] See, *inter alia*, the examples cited in: Franck Paul Weber, "*Expulsion: genèse et pratique d'un contrôle en Allemagne*", *Cultures et Conflits*, No. 23 (1996), pp. 107–153; Anne Bazin, "*Les décrets Beneš et l'intégration de la République tchèque dans l'Union européenne*", *Questions d'Europe*, No. 59, 22 September 2002; and Louis B. Sohn and Richard R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", *American Journal of International Law*, vol. 55, 1961, p. 566.

[81] See Goodwin-Gill, *op. cit., supra* note 79, pp. 216–217 and 307–308.

Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly in 1985, which states: "No alien shall be arbitrarily deprived of his or her lawfully acquired assets."[82]

(2) In addition, an expulsion for the sole purpose of confiscation of the assets of the alien in question implicates the right to property as recognized in various human rights treaties.[83] It should be noted that the prohibition set out in draft article 11 does not extend to situations in which assets are confiscated as a sanction consistent with law for the commission of an offence by an alien giving rise to the confiscation of assets.

### Article 12

### Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure

A State shall not resort to the expulsion of an alien in order to circumvent an ongoing extradition procedure.

### Commentary

(1) Draft article 12 sets out in general terms the prohibition against resorting to expulsion in order to circumvent an ongoing extradition procedure. One could speak of "disguised extradition" in this context.[84] As the wording of draft article 12 clearly indicates, the prohibition in question applies only as long as the extradition procedure is ongoing, in other words, from the moment at which the State in the territory of which the alien is present receives from another State a request for extradition in respect of the alien until a definitive decision is taken and enforced by the competent authorities of the first State on the request for extradition. It does not extend to situations in which no request for extradition has been made or to situations in which a request for extradition has been rejected or resolved in some other manner.

(2) In addition, the prohibition set out in draft article 12 relates only to situations in which the sole purpose of the expulsion is to circumvent an extradition procedure. The term "circumvent" presupposes an intention of the expelling State to use the expulsion procedure for the sole purpose of avoiding its obligations in the context of an extradition procedure. Where the sole purpose is not to circumvent an extradition procedure, the expelling State retains the right to expel an alien when the conditions for doing so have been met.

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[82] Resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 13 December 1985, annex, art. 9.

[83] See also draft article 20 below, concerning the protection of the property of an alien subject to expulsion.

[84] See European Court of Human Rights, *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, paras. 52–60, especially the Court's conclusion in paragraph 60 of its judgment: "Viewing the circumstances of the case as a whole and having regard to the volume of material pointing in the same direction, the Court consequently concludes that the applicant's deprivation of liberty in the night of 26 to 27 October 1975 was neither 'lawful', within the meaning of article 5 § 1 (f) (art. 5-1-f), nor compatible with the 'right to security of person'." Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to 'detention' necessary in the ordinary course of 'action ... taken with a view to deportation'. The findings of the presiding judge of the Paris tribunal de grande instance –– even if obiter — and of the Limoges Administrative Court, even if that court had only to determine the lawfulness of the order of 17 September 1979, are of the utmost importance in the Court's view; they illustrate the vigilance displayed by the French courts. There has accordingly been a breach of article 5 § 1 (art. 5–1) of the Convention."

## Part Three
## Protection of the rights of aliens subject to expulsion

### Chapter I
### General provisions

### Article 13
### Obligation to respect the human dignity and human rights of aliens subject to expulsion

1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.

2. They are entitled to respect for their human rights, including those set out in the present draft articles.

**Commentary**

(1) Draft article 13, paragraph 1, sets out the obligation of the expelling State to treat all aliens subject to expulsion with humanity and respect for the inherent dignity of the human person at all stages of the expulsion process. The wording of this paragraph is taken from article 10 of the International Covenant on Civil and Political Rights, which deals with the situation of persons deprived of their liberty. The addition *in fine* of the phrase "at all stages of the expulsion process" is intended to underline the general nature of the obligation in question, which covers all stages of the process that can lead to the adoption of an expulsion decision and its implementation, including, in some cases, the imposition of restrictive or custodial measures.

(2) The general principle of respect for the dignity of any alien subject to expulsion is of particular importance in view of the fact that aliens are not infrequently subjected to humiliating treatment in the course of the expulsion process offensive to their dignity as human beings, without necessarily amounting to cruel, inhuman or degrading treatment. The phrase "the inherent dignity of the human person", drawn from article 10 of the International Covenant on Civil and Political Rights, is intended to make it clear that the dignity referred to in this draft article is to be understood as an attribute that is inherent in every human being.

(3) Draft article 13, paragraph 2, simply recalls that all aliens subject to expulsion are entitled to respect for their human rights. The word "including", which precedes the reference to the rights mentioned in the draft articles, is intended to make it clear that the specific mention of some rights in the draft articles is justified only because of their particular relevance in the context of expulsion; their mention should not be understood as implying in any way that respect for those rights is more important than respect for other human rights not mentioned in the draft articles. It goes without saying that the expelling State is required, in respect of an alien subject to expulsion, to meet all the obligations incumbent upon it concerning the protection of human rights, both by virtue of international conventions to which it is a party and by virtue of general international law. That said, mention should be made in particular in this context of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly on 13 December 1985.[85]

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[85] General Assembly resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 13 December 1985, annex.

### Article 14
### Prohibition of discrimination

The expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

#### Commentary

(1) Draft article 14 concerns the obligation to respect rights without discrimination in the context of the expulsion of aliens. The obligation not to discriminate is set out, in varying formulations, in the major universal and regional human rights instruments.[86] This obligation has also been recognized in case-law concerning expulsion. It was for example, stated in general terms by the Iran-United States Claims Tribunal in the *Rankin* case:

> "A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State's action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State's treaty obligations."[87]

Also noteworthy is the *Mauritian women* case, in which the Human Rights Committee considered that there had been a violation of the International Covenant on Civil and Political Rights because the law in question introduced discrimination on the ground of sex by protecting the wives of Mauritian men against expulsion while not affording such protection to the husbands of Mauritian women.[88]

The European Court of Human Rights took the same position that the Human Rights Committee had taken in the aforementioned *Mauritian women* case in its judgment of 28 May 1985 in the *Abdulaziz, Cabales and Balkandali* case.[89] The Court held unanimously that article 14 of the European Convention on Human Rights had been violated by reason of discrimination against each of the applicants on the ground of sex: unlike male immigrants settled in the United Kingdom, the applicants did not have the right, in the same situation, to obtain permission for their non-national spouses to enter or remain in the country for settlement. After having stated that "advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe", the Court held that "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention".[90] It also emphasized that article 14 was concerned with the "avoidance of discrimination in the enjoyment of the Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways".[91] On the other hand, it held that in the current case, the fact that applicable rules affected "fewer white people than others" was not a sufficient reason to consider them as racist in character as they "did not contain regulations differentiating between persons or groups on the ground of their race or ethnic origin."[92]

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[86] See, for example, article 7 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 2 of the Convention on the Rights of the Child, article 14 of the European Convention on Human Rights and its Protocol No. 12 or article 28 of the African Charter on Human and Peoples' Rights.

[87] *Rankin v. Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 3 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, p. 142, para. 22.

[88] Communication No. R 9/35, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Views adopted on 9 April 1981, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), pp. 139–142, para. 9.2.

[89] European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Judgment of 28 May 1985, Series A, No. 94; relevant parts of the judgment are recalled by Marc Bossuyt in his commentary on article 14 in L.-E. Pettiti, E. Decaux and P.-H. Imbert (eds.), *La Convention européenne des droits de l'homme. Commentaire article par article* (Paris, Economica, 1999), pp. 482–483.

[90] *Ibid.*, para. 78.

(2) Draft article 14 sets out the obligation of the expelling State to respect the rights of the alien subject to expulsion without discrimination of any kind. As this obligation applies to the exercise of the right of expulsion, it covers both the decision to expel or not to expel and the procedures relating to the adoption of an expulsion decision and its possible implementation.

(3) The list of prohibited grounds for discrimination contained in draft article 14 is based on the list included in article 2, paragraph 1, of the International Covenant on Civil and Political Rights, with the addition of the ground of "ethnic origin" and a reference to "any other ground impermissible under international law." The express mention of "ethnic origin" in the draft article is justified because of the undisputed nature of the prohibition in contemporary international law of discrimination on this ground and in view of the particular relevance of ethnic issues in the context of the expulsion of aliens. The reference to "any other ground impermissible under international law" clearly indicates the non-exhaustive nature of the list of prohibited grounds for discrimination included in draft article 14.

(4) With regard to the prohibition of any discrimination on the ground of sexual orientation, differences remain and in certain regions the practice varies. In any case, there is international practice and case-law on this matter. It should be noted that the interpretation by the Human Rights Committee of the reference to "sex" in articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights was that the notion includes sexual orientation.[93]

(5) The reference in the draft article to "any other ground impermissible under international law" makes it possible to capture any legal development concerning prohibited grounds for discrimination that might have occurred since the adoption of the Covenant. On the other hand, it also preserves the possible exceptions to the obligation not to discriminate based on national origin. In particular, it preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union.[94]

### Article 15
### Vulnerable persons

1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.

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[91] *Ibid.*, para. 82.

[92] *Ibid.*, para. 85.

[93] Communication No. 488/1992, *Nicholas Toonen v. Australia*, Views adopted on 31 March 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40* (A/49/40), vol. II, p. 235, para. 8.7. For the case-law of the European Court of Human Rights, see, *inter alia*, *Salgueiro Da Silva Mouta v. Portugal*, Judgment of 21 December 1999, Application No. 33290/96, para. 28, and *E.B. v. France*, Judgment of 22 February 2008, Application No. 43546/02, para. 50.

[94] The European Court of Human Rights dealt with this issue in the case of a Moroccan national who was expelled from Belgium. The Court said that "[a]s for the preferential treatment given to nationals of the other member States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order."(*Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, para. 49).

2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.

### Commentary

(1) Draft article 15 sets out particular requirements concerning the expulsion of vulnerable persons such as children, older persons, persons with disabilities and pregnant women.

(2) Draft article 15, paragraph 1, is general in scope. It sets out the obligation of the expelling State to treat and protect vulnerable persons who are subject to expulsion with due regard for their vulnerabilities and special needs. The reference to the requirement that the individuals in question "shall be considered as such", is intended to emphasize the importance of due recognition by the expelling State of their vulnerabilities, as it is that recognition that would justify granting these individuals special treatment and protection.

(3) It is hardly possible to list in a draft article all categories of vulnerable persons that might merit special protection in the context of an expulsion procedure. Aside from the categories of persons explicitly mentioned, there might be other individuals, such as those suffering from incurable diseases or an illness requiring particular care which, *ex hypothesi*, could not be provided — or would be difficult to provide — in the possible State or States of destination. The addition of the phrase "and other vulnerable persons" clearly indicates that the list included in paragraph 1 is not exhaustive.

(4) Draft article 15, paragraph 2, deals with the specific case of children and reproduces the wording of article 3, paragraph 1, of the Convention on the Rights of the Child.[95] While not excluding consideration of other relevant factors, paragraph 2 sets out the requirement that the best interests of the child shall be a primary consideration in all decisions concerning children who are subject to expulsion.[96]

### Chapter II
### Protection required in the expelling State

### Article 16
### Obligation to protect the right to life of an alien subject to expulsion

The expelling State shall protect the right to life of an alien subject to expulsion.

### Commentary

Draft article 16 recalls the obligation of the expelling State to protect the right to life of an alien subject to expulsion. This right, which is "inherent" in "every human being" according to article 6, paragraph 1, of the International Covenant on Civil and Political Rights, is proclaimed, admittedly in various ways, in core international instruments for the protection of human rights, both universal[97] and regional.[98]

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[95] Convention on the Rights of the Child, New York, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3. Article 3 reads as follows: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[96] See in particular European Court of Human Rights, *Case of Mubilanzila Mayeka and Keniki Mitunga v. Belgium*, Judgment, 12 October 2006, Application No. 13178/03, para. 55.

[97] See in particular article 3 of the 1948 Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights.

### Article 17
### Prohibition of torture or cruel, inhuman or degrading treatment or punishment

The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

#### Commentary

(1) Draft article 17 recalls, in the context of expulsion, the general prohibition of torture or cruel, inhuman or degrading treatment or punishment. This is an obligation enshrined in various treaty instruments for the protection of human rights, both universal and regional.[99] The obligation not to subject aliens to torture or cruel, inhuman or degrading treatment is also set forth in General Assembly resolution 40/144.[100] In its judgment of 20 November 2010 in the *Ahmadou Sadio Diallo* case, the International Court of Justice recalled in connection with an expulsion case that the prohibition of inhuman or degrading treatment forms part of general international law.[101]

(2) Draft article 17 concerns only the obligation of the expelling State itself not to subject an alien to torture or cruel, inhuman or degrading treatment or punishment. On the other hand, the obligation not to expel an alien to a State where he or she may be subjected to such treatment or punishment is set out in draft article 24 below.

(3) Draft article 17 does not address the question of the extent to which the prohibition of torture or cruel, inhuman or degrading treatment or punishment also covers cases in which such treatment is inflicted, not by *de jure* or *de facto* State organs but by persons or groups acting in a private capacity. That issue is left to the relevant international monitoring bodies to assess or, where appropriate, to the courts that might be called upon to rule on the exact extent of the obligations arising from one instrument or another for the protection of human rights.[102]

### Article 18
### Obligation to respect the right to family life

The expelling State shall respect the right to family life of an alien subject to expulsion. It shall not interfere arbitrarily or unlawfully with the exercise of such right.

#### Commentary

(1) Draft article 18 establishes the obligation of the expelling State to respect the right to family life of an alien subject to expulsion. This right is of particular relevance in the

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[98] See article 2 of the European Convention on Human Rights; article 2 of the Charter of Fundamental Rights of the European Union; article 3 of the American Convention on Human Rights; article 4 of the African Charter on Human and Peoples' Rights; and article 5 of the Arab Charter on Human Rights.

[99] See, *inter alia*, article 5 of the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights, preambular paragraph 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the African Charter on Human and Peoples' Rights, article 5, paragraph 2, of the American Convention on Human Rights and article 3 of the European Convention on Human Rights.

[100] General Assembly resolution 40/144 of 13 December 1985, annex, art. 6.

[101] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 671, para. 87; See also paragraph (1) of the commentary to article 24 below.

[102] See, in this regard, the points made in para. (4) of the commentary to article 24 below.

context of the expulsion of aliens. By the mere fact of compelling an alien to leave the territory of a State, expulsion may undermine the unity of the alien's family in the event that, for various reasons, family members are not able to follow the alien to the State of destination. It is not surprising, therefore, that the legislation and case-law of various States recognize the need to take into account family considerations as a limiting factor in the expulsion of aliens.[103]

(2) The right to family life is included both in universal instruments and in regional conventions for the protection of human rights. At the universal level, article 17 of the International Covenant on Civil and Political Rights states:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, *family*, home or correspondence, nor to unlawful attacks on his honour and reputation. (emphasis added).
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

Similarly, under the terms of article 5, paragraph 1 (b), of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, aliens enjoy "the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence."[104]

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[103] See, for example, Czech Republic, Act No. 326 of 30 November 1999 on Residence of Aliens in the Territory of the Czech Republic and Amendment to Some Acts (as amended through Act No. 140 Sb. of 3 April 2001 and Act. No. 427 of 21 December 2010), art. 9(3); Spain, Organic Law 4/2000 (11 January 2000) concerning the rights and liberties of foreigners in Spain and their social integration, modified by the Organic Law 2/2009 (11 December 2009), arts. 57.5. b) and 64.2 a); Sweden, Aliens Act (SFS 2005:716), arts. 8:15, 8:13 and 8a:2; and Switzerland, Federal Act on Foreign Nationals (No. 142.20) of 16 December 2005, Art. 3 (2), and Chapter 7: Family Reunification (Art 42-52); see also *Re Ratzlaff*, Belgian State, Cour de Cassation, 21 September 1959, *International Law Reports*, volume 47, 1974, E. Lauterpacht (ed.), pp. 263–264; *Cazier v. Belgian State (Minister of Justice)*, Conseil d'État, 13 July 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 335–336; *K.A. v. State of the Netherlands*, District Court of the Hague, 12 July 1979, *International Law Reports*, volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 444–448; *Deportation to U. Case*, *ibid.*, pp. 613–617; *In Re Paul B*, Federal Republic of Germany, Federal Constitutional Court (Supreme Senate), 1 March 1966, *International Law Reports*, volume 45, E. Lauterpacht (ed.), pp. 371–376; *Expulsion Order Case*, *ibid.*, pp. 436–443; *Expulsion of Alien Case*, Federal Republic of Germany, Administrative Court of Appeals of Bavaria, 12 January 1966, *International Law Reports*, volume 57, E. Lauterpacht, C. J. Greenwood (eds.), pp. 313–315; *Residence Prohibition Order Case (1)*, *ibid.*, pp. 431–433; *Expulsion of Alien (Germany) Case*, German Federal Republic, Federal Administrative Supreme Court, 25 October 1956, *International Law Reports*, 1956, H. Lauterpacht (ed.), pp. 393–395; *Expulsion of Foreign National (Germany) Case*, Federal Republic of Germany, Administrative Court of Appeal of the Land of North Rhine-Westphalia, 16 May 1961, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 255–257; *In re Barahona*, Supreme Court of Costa Rica, 10 August 1939, *Annual Digest and Reports of Public International Law Cases*, 1938–1940, H. Lauterpacht (ed.), Case No. 138, pp. 386–388; *Louie Yuet Sun v. The Queen*, Ontario High Court of Justice, 22 March 1960, Supreme Court, 28 November 1960, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 252–255; *Seyoum Faisa Joseph v. U.S. Immigration & Naturalization Service*, *ibid.*; *Fernandes v. Secretary of State for the Home Department*, Court of Appeal of England, 20 November 1980, *International Law Reports*, volume 78, E. Lauterpacht, C.J. Greenwood (eds.), pp. 371–378; *Harisiades v. Shaughnessy*, *ibid.*, pp. 345–350 (expelled despite having a wife and children who were citizens). See also the memorandum of the Secretariat on expulsion of aliens (A/CN.4/565), paras. 466–467.

[104] General Assembly resolution 40/144 of 13 December 1985, annex.

(3) At the regional level, article 8, paragraph 1, of the European Convention on Human Rights provides that "[e]veryone has the right to respect for his private and family life …". Article 7 of the Charter of Fundamental Rights of the European Union reproduces this provision *in extenso*. Under section III (c) of the Protocol to the European Convention on Establishment,[105] the contracting States, in exercising their right of expulsion, must in particular pay due regard to family ties and the period of residence in their territory of the person concerned. While the African Charter on Human and Peoples' Rights does not contain this right, in other respects it is deeply committed to the protection of the family (see article 18). Article 11, paragraph 2, of the American Convention on Human Rights establishes this right in the same terms as the above-cited article 17 of the International Covenant on Civil and Political Rights. Article 21 of the Arab Charter on Human Rights also sets out the right.

(4) However, the obligation to respect the family life of an alien subject to expulsion, set out in the first sentence of draft article 18, does not accord the alien absolute protection against expulsion. The second sentence of draft article 18 indicates that the expelling State must not interfere arbitrarily or unlawfully with the exercise of that right. This limitation appears explicitly in article 17, paragraph 1, of the International Covenant on Civil and Political Rights and article 21, paragraph 1, of the Arab Charter of Human Rights and is highlighted in article 8, paragraph 2, of the European Convention on Human Rights.[106]

(5) The provisions of draft article 18 are without prejudice to the case-law on protection of family life established by the European Court of Human Rights. According to this case-law, the expelling State may interfere with the exercise of the right to family life only where provided by law and in achieving a "fair balance" between the interests of the State and those of the alien in question. The notion of "fair balance" is inspired by the Court's case-law regarding article 8 of the European Convention on Human Rights and, more specifically, by the requirement that "interference" in family life must be *necessary in a democratic society* within the meaning of paragraph 2 of that article. In *Moustaquim v. Belgium*, the Court concluded that the expulsion of Mr. Moustaquim did not satisfy that requirement.[107] Given the circumstances of the case, in particular the long period of time during which Mr. Moustaquim had resided in Belgium, the ties of his close relatives with Belgium as well as the relatively long interval between the latest offence committed by Mr. Moustaquim and the deportation order, the Court came to the conclusion that the measure was not "necessary in a democratic society" since "a proper balance was not achieved between the interests involved, and … the means employed was therefore disproportionate to the legitimate aim pursued."[108] The Court considered on several occasions whether expulsion measures in conformity with article 8 of the European Convention on Human Rights, particularly in the cases *Nasri v. France*,[109] *Cruz Varas and Others v. Sweden*[110] and *Boultif v. Switzerland*.[111] In this last case, the Court set forth a list of criteria to be applied in

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[105] European Convention on Establishment (with Protocol), Paris, 13 December 1955, United Nations, *Treaty Series*, vol. 529, No. 7660, p. 141.

[106] This requirement is set out in general terms in draft article 4, above.

[107] *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), European Court of Human Rights, 18 February 1991, Application No. 12313/86, paras. 41 to 46.

[108] *Ibid.*, para. 46.

[109] *Nasri v. France*, Judgment (Merits and Just Satisfaction), 13 July 1995, Application No. 19465/92, specifically para. 46.

[110] *Cruz Varas and Others v. Sweden*, Judgment (Merits), 20 March 1991, Application No. 15576/89, specifically para. 88.

[111] *Boultif v. Switzerland*, Judgment (Merits and Just Satisfaction), 2 August 2001, Application No. 54273/00.

order to determine whether the interference in family life resulting from an expulsion is "necessary in a democratic society."[112]

(6) The criterion of "fair balance" also seems compatible with the approach taken by the Human Rights Committee for the purpose of assessing whether expulsion measures are in conformity with article 17 of the International Covenant on Civil and Political Rights.[113]

### Article 19
### Detention of an alien for the purpose of expulsion

1. (a) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature.

(b) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.

2. (a) The duration of the detention shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority.

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[112] In more general terms, the Court set forth, in the *Case of Boultif v. Switzerland*, a list of criteria to be applied in order to determine whether the interference in family life resulting from an expulsion is "necessary in a democratic society". Such criteria include the nature and the seriousness of the offence committed by the applicant, the duration of the applicant's stay in the territory of the State, the time at which the offence was committed as well as many different factors relating to the family ties of the applicant, including children:

> "The Court has only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure in question was necessary in a democratic society. In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion." (European Court of Human Rights, *Case of Boultif v. Switzerland*, *op.cit.*, para. 48).

[113] According to the Committee, "the separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal" (communication No. 558/1993, Views adopted on 3 April 1997, *International Human Rights Reports*, vol. 5 (1998), p. 76, para. 11.4). In a previous case, the Committee found that "the interference with Mr. Stewart's family relation that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate State interest and due consideration was given in the deportation proceedings to the deportee's family connections" (communication No. 538/1993, Views adopted on 1 November 1996, *International Human Rights Reports*, vol. 4 (1997), p. 429, para. 12.10).

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(b) Subject to paragraph 2, detention for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

**Commentary**

(1) Draft article 19 sets forth the obligations of the expelling State in respect of the detention of an alien for the purpose of expulsion. Such obligations cover only situations in which deprivation of liberty is ordered in the context of an expulsion procedure and for the sole purpose of the alien's expulsion. The rules contained in draft article 19 do not cover the detention of an alien for any reason other than expulsion, including when it is caused by the commission of a crime that is both grounds for detention and a reason for expulsion.

(2) Draft article 19, paragraph 1, sets out the non-arbitrary and non-punitive nature of detention to which aliens facing expulsion may be subject.[114] Subparagraph (a) establishes the general principle that such detention must not be arbitrary or punitive in nature whereas subparagraph (b) sets out one of the consequences of that principle. Subparagraph (b) provides that, save in exceptional circumstances, an alien who is detained for the purpose of expulsion must be held separately from persons sentenced to penalties involving deprivation of liberty. Such a safeguard is granted to accused persons, in their capacity as unconvicted persons, under article 10, paragraph 2 (a), of the International Covenant on Civil and Political Rights. In view of the non-punitive nature of detention for the purpose of expulsion, there is all the more reason to provide the safeguard set out in article 10, paragraph 2, of the Covenant to aliens subjected to that form of detention, as indicated by the position expressed by the Human Rights Committee in its comments on article 13 of the Covenant in relation to expulsion. The Committee noted that if expulsion procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (articles 9[115] and 10[116]) may also be applicable.[117] The same requirement is set out in principle 8 of the Body

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[114] See, in this regard, Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62 (E/CN.4/2003/85), 30 December 2002, para. 43: "Administrative detention should never be punitive in nature."

[115] Article 9 of the Covenant provides: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[116] Article 10 of the Covenant provides: "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their

of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in the annex to General Assembly resolution 43/173 of 9 December 1988. This principle, which also covers detention for the purpose of expulsion, stipulates: “Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.” The International Court of Justice has likewise recognized that the scope of the provisions of article 9, paragraphs 1 and 2, of the Covenant is not confined to criminal proceedings: “they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory.”[118]

(3) The reference to “exceptional circumstances” that could justify non-compliance with the rule set out in paragraph 1 (b) is drawn from article 10, paragraph 2 (a), of the International Covenant on Civil and Political Rights.

(4) The rule set out in paragraph 1 (b) does not necessarily require the expelling State to put in place facilities specially set aside for the detention of aliens with a view to their expulsion; the detention of aliens could occur in a facility in which persons sentenced to custodial penalties are also detained, provided, however, that the aliens in question are placed in a separate section of the facility.

(5) It should be clarified that the safeguards mentioned above apply only to detention for the purpose of ensuring the implementation of an expulsion decision; they are without prejudice to the case of aliens subject to expulsion who have been convicted of a criminal offence, including those situations in which the expulsion of an alien might be ordered as an additional measure or as an alternative to prison.

(6) The important issue of the length of detention, which poses difficult problems in practice, is the subject of draft article 19, paragraph 2, which comprises two subparagraphs. Subparagraph (a) is general in scope and sets out the principle that the detention of an alien with a view to his or her expulsion is subject to time limits. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out and cannot be of excessive duration.[119] Such requirements are confirmed in international case-law, the legislation of various States and a significant number of judicial findings of

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reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

[117] Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 9.

[118] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 668, para. 77.

[119] The prohibition of excessive duration of detention was affirmed by the European Court of Human Rights with respect to article 5 of the European Convention on Human Rights; see in particular *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 113: “The Court recalls, however, that any deprivation of liberty under art. 5, para. 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under art. 5, para. 1 (f) ... It is thus necessary to determine whether the duration of the deportation proceedings was excessive.”

See also: Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62 (E/CN.4/2003/85), 30 December 2002, para. 35 (“Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should never be indefinite”) and para. 75 (g) ([the recommendation of] “[e]nsuring that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite”).

national courts.[120] The words "reasonably necessary" that appear in paragraph 2 (a) are intended to provide administrative authorities and, if necessary, a judicial authority with a standard to assess the necessity and the duration of the detention of an alien for the purpose of expulsion.

(7) Paragraph 2 (b) states that the extension of the duration of the detention may be decided upon only by a court or by another competent authority, subject to judicial review. The stipulation regarding judicial review of other competent authorities is designed to prevent possible abuses by the administrative authorities with respect to the length of the detention of an alien subject to expulsion. The content of paragraph 2 (b) is inspired by the case-law of the European Court of Human Rights.[121]

(8) Draft article 19, paragraph 3, is inspired by a recommendation put forward by the Special Rapporteur on the human rights of migrants.[122] Paragraph 3 (a) sets out the requirement of regular review of the detention of an alien for the purpose of expulsion on the basis of specific criteria established by law. According to paragraph 3 (a), it is detention as such, as opposed to the initial decision concerning placement in detention, that should be subject to regular review. Such safeguards flowed from the non-punitive nature of the detention of aliens for the purpose of expulsion.

(9) Paragraph 3 (b) sets out the principle that detention for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned. The application of this principle is without prejudice to the right of the expelling State to apply to the person subject to expulsion its criminal law for offences committed by that person. The entire paragraph should be understood in the light of paragraph 2, which means, in particular, that under paragraph 2 (a), even in the event that the impossibility of carrying out an expulsion decision is attributable to the alien in question, the alien cannot be kept in detention for an excessive length of time.

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[120] See, for example, Brazil, Federal Supreme Court, 29 October 1934, *Annual Digest and Reports of Public International Law Cases*, 1933–1934, H. Lauterpacht (ed.), Case No. 139, pp. 333–334; *Kestutis Zadvydas, Petitioner, v. Christine G. Davis* United States Supreme Court, 533. U.S. 678, 28 June 2001; *In re Flaumembaum*, Cámara Criminal de la Capital, 24 June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941–1942, H. Lauterpacht (ed.), Case No. 94, pp. 313–315; Constitutional Court of the Russian Federation, *Ruling No. 6, Case of the review of the constitutionality of a provision in the second part of article 31 of the USSR Act of 24 July 1981, "On the legal status of aliens in the USSR" in connection with the complaint of Yahya Dashti Gafur*, 17 February 1998; *In re Cantor*, Federal Supreme Court (Argentina), 6 April 1938, *Annual Digest and Reports of Public International Law Cases*, 1938–1940, H. Lauterpacht (ed.), Case No. 143, pp. 392–393; *In re Hely*, Venezuelan Federal Court of Cassation, 16 April, 1941 (Per ILR, 1941–42, p. 313); *Re Janoczka*, Manitoba Court of Appeal (Canada), 4 August 1932, *Annual Digest of Public International Law Cases*, 1931–1932, H. Lauterpacht (ed.), Case No. 154, pp. 291–292; *United States Ex Rel. Janivaris v. Nicolls*, United States, District Court, District of Massachusetts, 20 October 1942, *Annual Digest and Reports of Public International Law Cases*, 1941–1942, H. Lauterpacht (ed.), Case No. 95, pp. 316–318.

[121] See in particular *Shamsa v. Poland*, Judgment, 27 November 2003, Applications Nos. 45355/99 and 45357/99, para. 59. The Court referred to "the right of habeas corpus" contained in art. 5, para. 4, of the Convention to "support the idea that detention extended beyond the initial period as envisaged in paragraph 3 calls for the intervention of a court as a guarantee against arbitrariness".

[122] Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62 (E/CN.4/2003/85), 30 December 2002, para. 75 (g). This recommendation states:

> "(g) … The decision to detain should be automatically reviewed periodically on the basis of clear legislative criteria. Detention should end when a deportation order cannot be executed for other reasons that are not the fault of the migrant."

### Article 20
### Protection of the property of an alien subject to expulsion

The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

#### Commentary

(1) Draft article 20, which concerns the protection of the property of an alien subject to expulsion, establishes two obligations for the expelling State. The first relates to the adoption of measures to protect the property of the alien in question, while the second concerns the free disposal by the alien of his or her property.

(2) The wording of article 20 is sufficiently general to encompass all the guarantees relating to the protection of the property of an alien subject to expulsion under the applicable legal instruments. It should be recalled that article 17, paragraph 2 of the Universal Declaration of Human Rights states that "[n]o one shall be arbitrarily deprived of his property." Concerning expulsion more specifically, article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that:

> "6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.
>
> ...
>
> 9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her."

At the regional level, article 14 of the African Charter on Human and Peoples' Rights states that:

> "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

The American Convention on Human Rights (Pact of San José, Costa Rica) states in article 21 on the right to property that:

> "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
>
> […]"

Similarly, article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[123] states:

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[123] Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Paris, 20 March 1952, United Nations, *Treaty Series*, vol. 213, No. 2889, article 1, p. 262.

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Lastly, article 31 of the Arab Charter on Human Rights states:

> "Everyone has a guaranteed right to own property, and shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property."

(3) It may be considered that the obligation to protect the property of an alien subject to expulsion ought to involve allowing the individual a reasonable opportunity to protect the property rights and other interests that he or she may have in the expelling State. Failure to give an alien such opportunity has given rise to international claims.[124] As early as 1892, the Institute of International Law adopted a resolution containing a provision indicating that aliens who are domiciled or resident, or have a commercial establishment in the expelling State, shall be given the opportunity to settle their affairs and interests.

> "*L'expulsion d'étrangers domiciliés, résidents ou ayant un établissement de commerce ne doit être prononcée que de manière à ne pas trahir la confiance qu'ils ont eue dans les lois de l'État. Elle doit leur laisser la liberté d'user, soit directement, si c'est possible, soit par l'entremise de tiers par eux choisis, de toutes les voies légales pour liquider leur situation et leurs intérêts, tant actifs que passifs, sur le territoire.*" [Deportation of aliens who are domiciled or resident or who have a commercial establishment in the territory shall only be ordered in a manner that does not betray the trust they have had in the laws of the State. It shall give them the freedom to use, directly where possible or by the mediation of a third party chosen

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[124] In the *Hollander* case, the United States claimed compensation from Guatemala for the summary expulsion of one of its citizens and pointed out that Mr. Hollander "… was literally hurled out of the country, leaving behind wife and children, business, property, everything dear to him and dependent upon him, [and claimed that] [t]he Government of Guatemala, whatever its laws may permit, had not the right in time of peace and domestic tranquillity to expel Hollander without notice or opportunity to make arrangements for his family and business, on account of an alleged offense committed more than three years before …" (John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been Party*, vol. IV, p. 107). See also D.J Harris, *Cases and Materials on International Law*, 7th ed. (London, Sweet & Maxwell, 2010), p. 470, Letter from U.S. Dept. of State to Congressman, 15 December 1961, 8 Whiteman 861 (case of *Dr. Breger*): "As to Dr. Breger's expulsion from the island of Rhodes in 1938, it may be pointed out that under generally accepted principles of international law, a State may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner, such as by using unnecessary force to effect the expulsion or by otherwise mistreating the alien or by refusing to allow the alien a reasonable opportunity to safeguard property. In view of Dr. Breger's statement to the effect that he was ordered by the Italian authorities to leave the island of Rhodes within six months, it appears doubtful that international liability of the Italian Government could be based on the ground that he was not given enough time to safeguard his property."

> by them, every possible legal process to settle their affairs and their interests, including their assets and liabilities, in the territory.][125]

More than a century later, the Iran-United States Claims Tribunal held, in *Rankin v. The Islamic Republic of Iran*, that an expulsion was unlawful if it denied the alien concerned a reasonable opportunity to protect his or her property interests:

> "The implementation of this policy could, in general terms, be violative of both procedural and substantive limitations on a State's right to expel aliens from its territory, as found in the provisions of the Treaty of Amity and in customary international law. … For example, by depriving an alien of a reasonable opportunity to protect his property interests prior to his expulsion."[126]

Similarly, with regard in particular to migrant workers, paragraph 18 (sect. VI) of the Migration for Employment Recommendation (Revised), adopted by the General Conference of the International Labour Organization on 1 July 1949, reads as follows:

> "(1) When a migrant for employment has been regularly admitted to the territory of a Member, the said Member should, as far as possible, refrain from removing such person or the members of his family from its territory on account of his lack of means or the state of the employment market, unless an agreement to this effect has been concluded between the competent authorities of the emigration and immigration territories concerned.
>
> …
>
> (2) Any such agreement should provide:
>
> "(c) that the migrant must have been given reasonable notice so as to give him time, more particularly to dispose of his property" (emphasis added).

Such considerations are taken into account in national laws, which, *inter alia*, may afford the alien a reasonable opportunity to settle any claims for wages or other entitlements before his or her departure or provide for the necessary actions to be taken in order to ensure the safety of the alien's property while the alien is detained pending deportation.[127] More generally, the need to protect the property of aliens subject to expulsion is also taken into account, to varying degrees and in different ways, by the laws of a number of States.[128]

(4) According to draft article 20, an alien must be guaranteed the free disposal of his or her property "in accordance with the law". This clarification should not be interpreted as allowing the expelling State to apply laws that would have the effect of denying or limiting arbitrarily the free disposal of property. However, it takes sufficient account of the interest that the expelling State may have in limiting or prohibiting, in accordance with its own laws, the free disposal of certain assets, particularly assets that were illegally acquired by the alien in question or that might be the proceeds of criminal or other unlawful activities. Furthermore, the clarification that the alien should be allowed to dispose freely of his or her property "even from abroad" is intended to address the specific needs, where applicable, of an alien who has already left the territory of the expelling State because of an expulsion decision concerning him or her. That point was taken into account by the International Court of Justice in its 2010 judgment in the *Diallo* case, even although the Court ultimately

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[125] *Règles internationales sur l'admission et l'expulsion des étrangers* [International Regulations on the Admission and Expulsion of Aliens], Geneva session, 1892, resolution of 9 September 1892, art. 41.

[126] *Rankin v. The Islamic Republic of Iran*, Award of 3 November 1987, *Iran-US Claims Tribunal Reports*, vol. 17, p. 147, para. 30 e.

[127] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 714.

[128] For an overview, see *ibid.*, para. 481.

found that in the case in question Mr. Diallo's direct rights as *associé* had not been violated by the Democratic Republic of the Congo, because "no evidence [had] been provided that Mr. Diallo would have been precluded from taking any action to convene general meetings from abroad, either as *gérant* or as *associé*."[129]

(5) It is understood that the rules set forth in draft article 20 are without prejudice to the right any State has to expropriate or nationalize the property of an alien, in accordance with the applicable rules of international law.

(6) The issue of the property rights of enemy aliens in time of armed conflict is not specifically addressed in draft article 20, since the Commission's choice, as mentioned in the commentary to draft article 9, is not to address aspects of the expulsion of aliens in time of armed conflict. It should, however, be noted that the issue of property rights in the event of armed conflict was the subject of extensive discussion in the Eritrea- Ethiopia Claims Commission.[130]

## Chapter III
## Protection in relation to the State of destination

### Article 21
### Departure to the State of destination

1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.

3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

### Commentary

(1) Draft article 21 concerns the protection that an expelling State must accord an alien subject to expulsion in relation to his or her departure to a State of destination. The draft article covers the possibility of both voluntary departure and forcible implementation of the expulsion decision.

(2) Article 21, paragraph 1, provides that the expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.[131] Even

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[129] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 681, para. 121.

[130] Eritrea-Ethiopia Claims Commission, *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27–32*, decision of 17 December 2004, paras. 124–129, 133, 135–136, 140, 142, 144–146 and 151–152, and *ibid., Ethiopia's Claim 5*, decision of 17 December 2004, paras. 132–135; United Nations, *Reports of International Arbitral Awards*, vol. XXVI, pp. 195–247 and 249–290.

[131] The voluntary departure of the alien facing expulsion permits greater respect for human dignity while being easier to manage administratively. The implementation of this expulsion process is negotiated between the expelling State and the alien subject to the expulsion order. In 2005, the Committee of Ministers of the Council of Europe placed the emphasis on voluntary departure, saying that "The host state should take measures to promote voluntary returns, which should be preferred to forced returns." (Twenty guidelines of the Committee of Ministers of the Council of Europe on forced return, 925th meeting, 4 May 2005, documents of the Committee of Ministers CM(2005) 40 final, 9 May 2005). Similarly, in its proposal for a directive on return of 1 September 2005, the Commission of the European Communities indicated that the return decision shall provide for "an appropriate period for

though it aims to a certain extent to make voluntary departure of the alien the preferred solution, the provision cannot be interpreted as authorizing the expelling State to exert undue pressure on the alien to opt for voluntary departure rather than forcible implementation of an expulsion decision. It aims at facilitating voluntary departure, where appropriate.

(3) Paragraph 2 concerns cases of forcible implementation of an expulsion decision. It provides that in such a case the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law. It should be clarified in this regard that the expression "safe transportation ... in accordance with the rules of international law" refers not only to the requirement to ensure the protection of the rights of the alien subject to expulsion and avoid any excessive use of force against the alien but also to the need to ensure, if necessary, the safety of persons other than the alien in question, for example the passengers on an aeroplane taken by the alien to travel to the State of destination.

(4) This requirement was implicit in the arbitral award rendered in the *Lacoste* case, although it was held that the claimant had not been subjected to harsh treatment:

> "*Lacoste* further claims damages for his arrest, imprisonment, harsh and cruel treatment, and expulsion from the country. ... The expulsion does not, however, appear to have been accompanied by harsh treatment, and at his request the claimant was allowed an extension of the term fixed for his leaving the country."[132]

Similarly, in the *Boffolo* case, the umpire indicated in general terms that "[e]xpulsion […] must be accomplished in the manner least injurious to the person affected".[133]

In the *Maal* case, the umpire stressed the sacred character of the human person and the requirement that an expulsion should be accomplished without unnecessary indignity or hardship:

> "[H]ad the exclusion of the claimant been accomplished without unnecessary indignity or hardship to him the umpire would feel constrained to disallow the claim.
>
> …
>
> From all the proof he came here as a gentleman and was entitled throughout his examination and deportation to be treated as a gentleman, and whether we have to consider him as a gentleman or simply as a man his rights to his own person and to his own undisturbed sensitivities is one of the first rights of freedom and one of the priceless privileges of liberty. The umpire has been told to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the

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voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period." (Proposal for a directive of the European Parliament and of the Council, 1 September 2005, on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005) 391 final).

[132] *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. IV, pp. 3347–3348.

[133] *Boffolo* case, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 528 (Ralston, Umpire).

spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted."[134]

(5) When transportation of the alien to the State of destination takes place, for example, by aeroplane, reference to the rules of international law also cover the rules relating to air transportation, particularly the regulations adopted in the framework of the International Civil Aviation Organization (ICAO). The Convention on International Civil Aviation and annex 9 thereto should be mentioned in particular in this respect.[135] The annex states, *inter alia*, that:

> "5.2.1 During the period when […] a person to be deported is under their custody, the state officers concerned shall preserve the dignity of such persons and take no action likely to infringe such dignity."

(6) In both situations considered in draft article 21 — voluntary departure of the alien or forcible implementation of the expulsion decision — paragraph 3 requires the expelling State to give the alien a reasonable period of time to prepare for his or her departure, taking into account all circumstances. The circumstances to be taken into account for the purpose of determining what seems in the case in question to be a reasonable period of time vary in nature. They can relate to, *inter alia*, ties (social, economic or other) that the alien subject to expulsion has established with the expelling State, the conduct of the alien in question, including, where applicable, the nature of the threat to the national security or public order of the expelling State that the presence of the alien in its territory could constitute or the risk that the alien would evade the authorities of the State order to avoid expulsion. The requirement of granting a reasonable period of time to prepare for departure must also be understood in the light of the need to permit the alien subject to expulsion to protect adequately his or her property rights and other interests in the expelling State.[136]

### Article 22
### State of destination of aliens subject to expulsion

1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.

2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

### Commentary

(1) Draft article 22 concerns the determination of the State of destination of aliens subject to expulsion. In this context, paragraph 1 refers first of all to the alien's State of nationality, since it is undisputed that that State has an obligation to receive the alien under

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[134] *Maal* case, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 732.

[135] Convention on International Civil Aviation, Chicago, 7 December 1944, United Nations, *Treaty Series*, vol. 15, No. 102, p. 295, and annex 9, Facilitation; the text is also available on the ICAO website: http://www.icao.int.

[136] See above, para. (3) of the commentary to draft article 20.

international law.[137] In the case of a person who has several nationalities, the term "his or her State of nationality" means each of the countries of which the person is a national. In accordance with draft articles 23 and 24 of the present draft articles, if the alien subject to expulsion is justified in fearing for his or her life or there are substantial grounds for believing that she or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment, then he or she cannot be expelled to such a country. Paragraph 1 also recognizes the existence of other potential States of destination, distinguishing between States that might be obliged, under international law, to receive the alien and those that are not obliged to do so. This distinction reflects, with regard to the expulsion of aliens, the uncontested principle that a State is not required to receive aliens in its territory, save where obliged to do so by a rule of international law. While this is a fundamental distinction, it does not necessarily result in an order of priority in determining the State of destination of an expelled alien; in other words, the fact that a State of nationality has been identified and that there is, hypothetically, no legal obstacle to the alien's expulsion to that State in no way precludes the possibility of expelling the alien to another State that has the obligation to receive the alien under international law, or to any other State willing to accept him or her. In this regard, the expelling State, while retaining a margin of appreciation in the matter, should take into consideration, as far as possible, the preferences expressed by the expelled alien for the purposes of determining the State of destination.[138]

(2) The wording "or any other State that has the obligation to receive the alien under international law" is intended to cover situations where a State other than the State of nationality of the expelled alien would be required to receive that person under a rule of international law, whether a treaty rule binding on that State or a rule of customary international law.[139] One should also mention, in this context, the position expressed by the

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[137] See, *inter alia*, the Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties, adopted by the VIth international Conference of American States, signed at Havana on 20 February 1928, League of Nations, *Treaty Series*, vol. CXXXII, 1932–1933, No. 3045, p. 306. Article 6, paragraph 2, reads: "States are required to receive their nationals expelled from foreign soil who seek to enter their territory." See also, Institute of International Law, *Règles internationales sur l'admission et l'expulsion des étrangers*, Geneva session, 9 September 1892, *Annuaire de l'Institut de droit international*, vol. XII, 1892–1894, art. 2: "In principle, a State must not prohibit access into or a stay in its territory either to its subjects or to those who, after having lost their nationality in said State, have acquired no other nationality." See also article 32, paragraph 3, of the Refugee Convention.

[138] See in particular article 22, paragraph 7, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3), which reads as follows: "Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin." See also article 32, paragraph 3, of the Convention Relating to the Status of Refugees (Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545).

[139] For examples of the first hypothesis, see Robert Jennings and A. Watts, in *Oppenheim's International Law*, 9th ed., pp. 898–899 (referring to, *inter alia*, the Treaty establishing the EEC, 1957; the Protocol between the Governments of Denmark, Finland, Norway and Sweden concerning the exemption of nationals of these countries from the obligation to have a passport or residence permit while resident in a Scandinavian country other than their own (United Nations, *Treaty Series*, vol. 199, p. 29) [concluded on 22 May 1954] (Iceland acceded in 1955); the Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers, 1957 (United Nations, *Treaty Series*, vol. 322, p. 245) (Iceland became a party effective from 1966), as modified by a further agreement in 1979: RG, 84 (1980), p. 376; and the Convention between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands on the

Human Rights Committee in relation to article 12, paragraph 4, of the International Covenant on Civil and Political Rights:

> "The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence."[140]

Thus, paragraph 1, by acknowledging that an alien subject to expulsion may express a preference as to the State of destination, permits the alien to make known the State with which he or she has the closest links, such as the State of prior residence, the State of birth or the State with which the alien has particular family or financial links. Draft article 22, paragraph 1, gives the expelling State the right to assess such factors in order to preserve its own interests as well as those of the alien subject to expulsion.

(3) Draft article 22, paragraph 2, addresses the situation where it has not been possible to identify either the State of nationality or any other State that has the obligation to receive the alien under international law. In such cases, it is stated that the alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State. The last phrase ("the State from where he or she has entered the expelling State") should be understood primarily to mean the State of embarkation, although the chosen wording is sufficiently general also to cover situations where an alien has entered the territory of the expelling State by a mode of transport other than air transport.

(4) Readmission agreements are of particular interest in determining the State of destination of an expelled alien. These agreements fall within the broad scope of international cooperation, in which States exercise their sovereignty in light of variable considerations that in no way lend themselves to normative standardization through codification. That said, such agreements should be implemented in compliance with the relevant rules of international law, particularly those aimed at protecting the human rights of the alien subject to expulsion.

(5) Determination of the State of destination of the alien subject to expulsion under draft article 22 must be done in compliance with the obligations contained in draft article 6, subparagraph (b) (prohibition of *refoulement*), and in draft articles 23 and 24, which prohibit expulsion of an alien to a State where his or her life would be threatened or to a State where the alien may be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

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transfer of controls of persons to the external frontiers of Benelux territory, 1960 (United Nations, *Treaty Series*, vol. 374, p. 3)).

[140] Human Rights Committee, general comment No. 27, Freedom of movement (art. 12), adopted on 18 October 1999, para. 20.

### Article 23
### Obligation not to expel an alien to a State where his or her life would be threatened

1. No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. A State that does not apply the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

#### Commentary

(1) Draft article 23 deals with protection of the life of an alien subject to expulsion in relation to the situation in the State of destination. Paragraph 1 prohibits the expulsion of an alien "to a State where his or her life would be threatened" on one of the grounds set out in draft article 14, which establishes the obligation not to discriminate. The wording referring to a State "where his or her life would be threatened", which delimits the scope of this prohibition of expulsion, corresponds to the content of article 33 of the Convention relating to the Status of Refugees of 28 July 1951, which establishes the prohibition of return (*refoulement*), without extending to all aliens the prohibition of expulsion or return (*refoulement*) of a refugee to a State where his or her freedom would be threatened.

(2) The prohibited grounds of discrimination set out in draft article 14 and reproduced in draft article 23 are those contained in article 2, paragraph 1, of the International Covenant on Civil and Political Rights. There is no valid reason why the list of discriminatory grounds in draft article 23 should be less broad in scope than the list contained in draft article14. In particular, the list of grounds contained in article 33 of the 1951 Convention was too narrow for the present draft article, which addresses the situations not only of persons who could be defined as "refugees", but of aliens in general, and in a wide range of possible situations. As for the prohibition of any discrimination on grounds of sexual orientation, there is a trend in that direction in international practice and case-law, but the prohibition is not universally recognized.[141]

(3) Paragraph 2 of draft article 23 concerns the specific situation where the life of an alien subject to expulsion would be threatened in the State of destination by the imposition or execution of the death penalty, unless an assurance has previously been obtained that the death penalty will not be imposed or, if already imposed, will not be carried out. The Human Rights Committee has taken the position that, under article 6 of the Covenant, States that did not have the death penalty or have abolished it may not expel a person to another State in which he or she has been sentenced to death, unless they have previously obtained an assurance that the penalty will not be carried out.[142] While it may be considered

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[141] See above, paragraph (4) of the commentary to draft article 14.

[142] See, in this regard, Human Rights Committee, Communication No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40*, vol. II (A/58/40 (Vol. II)), p. 93, para. 10.6: "For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not

that, within these precise limits, this prohibition now corresponds to a distinct trend in international law, it would be difficult to state that international law goes any further in this area.

(4) Consequently, paragraph 2 of draft article 23 constitutes progressive development in two respects: first, because the prohibition established in paragraph 2 covers not only States that did not have the death penalty or have abolished it, but also States that retain the penalty in their legislation but do not apply it in practice: this is the meaning of the phrase, "[a] State that does not apply the death penalty"; second, because the scope of protection has been extended to cover not only situations where the death penalty has already been imposed but also those where there is a real risk that it will be imposed.

### Article 24

### Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

#### Commentary

(1) The wording of draft article 24, which obliges the expelling State not to expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment, is inspired by article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[143] Article 3 of the Convention restricts the obligation of *non-expulsion* to acts of torture. It does not therefore extend this obligation to situations in which there are substantial grounds for believing that an alien subject to expulsion would be subjected to cruel, inhuman or degrading treatment or punishment.[144] However, draft article 24 broadens the scope of the protection afforded by this provision of the Convention, since the obligation not to expel contained in the draft article covers not only torture, but also other cruel, inhuman or degrading treatment or punishment. This broader scope of the prohibition has been introduced at the universal level and by certain regional systems. At the universal level, it is reflected in general comment

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be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author."

[143] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85. Article 3 of the Convention states:

> "1. No State party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

[144] See, *inter alia*, *S.V. et al v. Canada*, Committee against Torture, Communication No. 49/1996, 15 May 2001, U.N. Doc. CAT/C/26/D/49/1996; *B.S. v. Canada*, Committee against Torture, Communication No. 166/2000, 14 November 2001, U.N. Doc. CAT/C/27/D/166/2000; and *T.M. v. Sweden*, Committee against Torture, Communication No. 228/2003, 18 November 2003, U.N. Doc. CAT/C/31/D/228/2003; see also Manfred Nowak, Elizabeth McArthur (eds.), The United Nations Convention Against Torture: A Commentary, New York, O.U.P., 2008, pp. 165–166.

No. 20 of the Human Rights Committee to the effect that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."[145] In its Views in *Maksudov et al v. Kirghizstan*, dated 31 July 2008, the Human Rights Committee recalled the principle set out in General Comment No. 20 and added that it "should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of."[146] A recommendation by the Committee on the Elimination of Racial Discrimination takes a similar stance.[147] At the regional level, this global or undifferentiated approach to torture and to other cruel, inhuman or degrading treatment or punishment has been enunciated in the jurisprudence of the European Court of Human Rights concerning article 3 of the European Convention on Human Rights.[148] The Inter-American Court of Human Rights has affirmed a similar position in *Lori Berenson-Mejía v. Peru*, in which it stated that:

> "torture and cruel, inhuman or degrading punishment or treatment are strictly prohibited by international human rights law. The prohibition of torture and cruel, inhuman or degrading punishment or treatment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes."[149]

(2) With regard to determining the existence of "substantial grounds" within the meaning of draft article 24, attention should be drawn to article 3, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states that the competent authorities shall take into account "all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights". This provision has been interpreted on many occasions by the Committee against Torture established pursuant

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[145] Human Rights Committee, forty-fourth Session, 1992, *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, U.N. Doc. HRI/GEN/1/Rev.6, general comment No. 20, para. 9.

[146] *Maksudov et al. v. Kyrgyzstan*, Human Rights Committee, Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, 31 July 2006, U.N. Doc. CCPR/C/93/D/1461, 1462, 1476 and 1477/2006, para. 12.4.

[147] See the recommendation of the Committee on the Elimination of Racial Discrimination to States parties to the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965, United Nations, *Treaty Series*. vol. 660, No. 9464, p. 212) to "[e]nsure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment" (general recommendation No. 30: Discrimination against non-citizens, 64th session, 23 February–12 March 2004, CERD/C/64/Misc.11/Rev.3, para. 27).

[148] See, in particular, *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, paras. 72–107. In paragraph [illegible]0, the Court states: "The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees …"

[149] *Lori Berenson-Mejía v. Peru*, Inter-American Court of Human Rights, judgment of 25 November 2004, Series C, No. 119, para. 100 (footnote omitted).

to the Convention, which has considered a number of communications alleging that the expulsion of aliens to particular States was contrary to article 3.[150]

(3) The Committee against Torture has adopted guidelines concerning the implementation of article 3 in its general comment No. 1.[151] These guidelines indicate the information that may be relevant in determining whether the expulsion of an alien to a particular State is consistent with article 3:

> "The following information, while not exhaustive, would be pertinent:
>
> (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)?
>
> (b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
>
> (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
>
> (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
>
> (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
>
> (f) Is there any evidence as to the credibility of the author?

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[150] See, *inter alia*, *Mutombo v. Switzerland*, Committee against Torture, Communication No. 13/1993, 27 April 1994, U.N. Doc. CAT/C/12/D/13/1993; *Khan v. Canada*, Committee against Torture, Communication No. 15/1994, 15 November 1994, U.N. Doc. A/50/44; *Kisoki v. Sweden*, Committee against Torture, Communication No. 41/1996, 8 May 1996, U.N. Doc. CAT/C/16/D/41/1996; *Tala v. Sweden*, Committee against Torture. Communication No. 43/1996, 15 November 1996, U.N. Doc. CAT/C/17/D/43/1996; *Paez v. Sweden*, Committee against Torture, Communication No. 39/1996, 28 April 1997, U.N. Doc. CAT/C/18/D/39/1996; *Aemei v. Switzerland*, Committee against Torture, Communication No. 34/1995, 9 May 1997, U.N. Doc. CAT/C/18/D/34/1995; *A.F. v. Sweden*, Committee against Torture, Communication No. 89/1997, 3 September 1997, U.N. Doc. CAT/C/20/D/89/1997; *Ayas v. Sweden*, Committee against Torture, Communication No. 97/1997, 12 November 1998, U.N. Doc. CAT/C/21/D/97/1997; *Korban v. Sweden*, Committee against Torture, Communication No. 88/1997, 16 November 1998, U.N. Doc. CAT/C/21/D/88/1997; *Haydin v. Sweden*, Committee against Torture, Communication No. 101/1997, 20 November 1998, U.N. Doc. CAT/C/21/D/101/1997; *Elmi v. Australia*, Committee against Torture, Communication No. 120/1998, 14 May 1999, U.N. Doc. CAT/C/22/D/120/1998; *A.S. v. Sweden*, Committee against Torture, Communication No. 149/1999, 6 November 1999, U.N. Doc. CAT/C/25/D/149/1999; *Arana v. France*, Committee against Torture, Communication No. 63/1997, 9 November 1999, U.N. Doc. CAT/C/23/D/63/1997; *Karoui v. Sweden*, Committee against Torture, Communication No. 185/2001, 8 May 2002, U.N. Doc. 1/57/44; *Rios v. Canada*, Committee against Torture, Communication No. 133/1999, 17 December 2004, U.N. Doc. CAT/C/33/D/133/1999; *T.A. v. Sweden*, Committee against Torture, Communication No. 226/2003, 27 May 2005, U.N. Doc. CAT/C/34/D/226/2003; *Agiza v. Sweden*, Committee against Torture, Communication No. 233/2003, 24 May 2005, U.N. Doc. CAT/C/34/D/233/2003; *Brada v. France*, Committee against Torture, Communication No. 195/2002, 24 May 2005, U.N. Doc. CAT/C/34/D/195/2002; *Dadar v. Canada*, Committee against Torture, Communication No. 258/2004, 5 December 2005, U.N. Doc. CAT/C/35/D/258/2004.

[151] Committee against Torture, general comment on the implementation of article 3 of the Convention in the context of article 22 (general comment No. 1), adopted on 21 November 1997.

> (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?"[152]

The Committee has also indicated that substantial grounds for believing that there is a risk of torture require more than a mere theory or suspicion but less than a high probability of such a risk.[153] Other elements on which the Committee against Torture has provided important clarifications are the existence of a personal risk of torture;[154] the existence, in this context, of a present and foreseeable danger;[155] the issue of subsequent expulsion to a third State;[156] and the absolute nature of the prohibition.[157]

(4) As was the case for draft article 17,[158] the Commission preferred not to address, in the text of draft article 24, situations where the risk of torture or cruel, inhuman or degrading treatment or punishment emanated from persons or groups of persons acting in a private capacity. In this regard, it should be recalled that in its general comment No. 1, the Committee against Torture expressed the following view on this issue:

> "Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, of 'a consistent pattern or gross, flagrant or mass violations of human rights' refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[159]

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[152] *Ibid.*, para. 8.

[153] *Ibid.*, para. 6: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable."

[154] *Ibid.*, para. 1: "Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention." See also: Committee against Torture, communication No. 13/1993, *Mutombo v. Switzerland*, Views adopted on 27 April 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 44* (A/49/44), p. 52, para. 9.3.

[155] See, for example, *A.D. v. The Netherlands*, Committee against Torture, Communication No. 96/1997, 12 November 1999, U.N. Doc. CAT/C/23/D/96/1997; *U.S. v. Finland*, Committee against Torture, Communication No. 197/2002, U.N. Doc. CAT/C/30/D/197/2002.

[156] See, on this point, the above-cited general comment No. 1 of the Committee against Torture, para. 2: "The Committee is of the view that the phrase 'another State' in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited" .

[157] See, for example, *Paez v. Sweden*, Committee against Torture, Communication No. 39/1996, 28 April 1997, U.N. Doc. CAT/C/18/D/39/1996 and *Dadar v. Canada*, Committee against Torture, Communication No. 258/2004, 5 December 2005, U.N. Doc. CAT/C/35/D/258/2004.

[158] See para. (3) of the commentary to draft article 17 above.

[159] Committee against Torture, general comment on the implementation of article 3 of the Convention in the context of article 22 (general comment No. 1) (A/53/44), annex IX, adopted on 21 November 1997, para. 3. See also Committee against Torture, communication No. 258/2004, *Mostafa Dadar v. Canada*, Decision adopted on 23 November 2005, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), p. 241, para. 8.4; communication No. 177/2001, *H.M.H.I. v. Australia*, Decision adopted on 1 May 2002, *ibid., Fifty-seventh Session, Supplement No. 44* (A/57/44), p. 171, para. 6.4; and communication No. 191/2001, *S.S. v. The Netherlands*, Decision adopted on 5 May 2003, *ibid., Fifty-eighth Session, Supplement No. 44* (A/58/44), p. 123, para. 6.4: "The issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned."

For its part, the European Court of Human Rights has drawn from the absolute character of article 3 of the European Convention on Human Rights the conclusion that the said provision may also cover cases where the danger emanates not from the State of destination itself but from "persons or groups of persons who are not public officials", when the State of destination is not able to offer adequate protection to the individual concerned.

> "Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However,

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See also communication No. 237/2003, *Ms. M.C.M.V.F. v. Sweden*, Decision adopted on 14 November 2005, *ibid., Sixty-first Session, Supplement No. 44* (A/61/44), p. 194, para. 6.4:

> "The Committee has not been persuaded that the incidents that concerned the complainant in 2000 and 2003 were linked in any way to her previous political activities or those of her husband, and considers that the complainant has failed to prove sufficiently that those incidents be attributable to state agents or to groups acting on behalf of or under the effective control of state agents";

and communication No. 120/1998, *S.S. Elmi v. Australia*, Views adopted on 14 May 1999, *ibid., Fifty-fourth Session, Supplement No. 44* (A/54/44), pp. 119–120, paras. 6.5–6.8:

> "The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 (i.e. pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, in this instance for discriminatory purposes). The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, *de facto*, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in article 1.
>
> The State party does not dispute the fact that gross, flagrant or mass violations of human rights have been committed in Somalia. Furthermore, the independent expert on the situation of human rights in Somalia, appointed by the Commission on Human Rights, described in her report the severity of those violations, the situation of chaos prevailing in the country, the importance of clan identity and the vulnerability of small, unarmed clans such as the Shikal, the clan to which the author belongs.
>
> The Committee further notes, on the basis of the information before it, that the area of Mogadishu where the Shikal mainly reside, and where the author is likely to reside if he ever reaches Mogadishu, is under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services. Furthermore, reliable sources emphasize that there is no public or informal agreement of protection between the Hawiye and the Shikal clans and that the Shikal remain at the mercy of the armed factions.
>
> In addition to the above, the Committee considers that two factors support the author's case that he is particularly vulnerable to the kind of acts referred to in article 1 of the Convention. First, the State party has not denied the veracity of the author's claims that his family was particularly targeted in the past by the Hawiye clan, as a result of which his father and brother were executed, his sister raped and the rest of the family was forced to flee and constantly move from one part of the country to another in order to hide. Second, his case has received wide publicity and, therefore, if returned to Somalia the author could be accused of damaging the reputation of the Hawiye."

it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."[160]

## Chapter IV
## Protection in the transit State

### Article 25
### Protection in the transit State of the human rights of an alien subject to expulsion

The transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

**Commentary**

The implementation of an expulsion order often involves the transit of the alien through one or more States before arrival in the State of destination.[161] Draft article 25 sets out the transit State's obligation to protect the human rights of the alien subject to expulsion, in conformity with its obligations under international law. The chosen wording clearly indicates that the transit State is obliged to respect only its own obligations under international conventions to which it is a party or under the rules of general international law, and not obligations that are, *ex hypothesi*, binding on the expelling State alone.

## Part Four
## Specific procedural rules

### Article 26
### Procedural rights of aliens subject to expulsion

1. An alien subject to expulsion enjoys the following procedural rights:

(a) the right to receive notice of the expulsion decision;

(b) the right to challenge the expulsion decision, except where compelling reasons of national security otherwise require;

(c) the right to be heard by a competent authority;

(d) the right of access to effective remedies to challenge the expulsion decision;

(e) the right to be represented before the competent authority; and

(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.

3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.

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[160] *H.L.R. v. France*, Judgment (Merits), 29 April 1997, Application No. 24573/94, para. 40.

[161] In general, priority is given to direct return, without transit stops in the ports or airports of other States. However, the return of illegal residents may require use of the airports of certain States in order to make the connection to the third destination State (paragraph 3.3. of the Green Paper on a community return policy on illegal residents, European Commission, 10 April 2002, COM(2002) 175 final).

4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for a brief duration.

**Commentary**

(1) Draft article 26, paragraph 1, sets out a list of procedural rights from which any alien subject to expulsion must benefit, irrespective of whether that person is lawfully or unlawfully present in the territory of the expelling State. The sole exception — to which reference is made in paragraph 4 of the draft article — is that of aliens who have been unlawfully present in the territory of that State for a brief duration.

(2) Paragraph 1 (a) sets forth the right to receive notice of the expulsion decision. The expelling State's respect for this essential guarantee is a *conditio sine qua non* for the exercise by an alien subject to expulsion of all of his or her procedural rights. This condition was explicitly embodied in article 22, paragraph 3, of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which stipulates that the expulsion decision "shall be communicated to them in a language they understand". In 1892 the Institute of International Law already expressed the view that "*l'acte ordonnant l'expulsion est notifié à l'expulsé*" [the expulsion order shall be notified to the expellee][162] and also that "*si l'expulsé a le faculté de recourir à une haute cour judiciaire ou administrative, il doit être informé, par l'acte même, et de cette circonstance et du délai à observer*" [if the expellee is entitled to appeal to a high judicial or administrative court, the expulsion order must indicate this and state the deadline for filing the appeal].[163] The legislation of several States contains a requirement that an expulsion decision must be notified to the alien concerned.[164]

(3) Paragraph 1 (b) sets out the right to challenge the expulsion decision, a right well established in international law. At the universal level, article 13 of the International Covenant on Civil and Political Rights provides the individual facing expulsion with the right to submit the reasons against his or her expulsion, except where "compelling reasons of national security otherwise require". It states that "[a]n alien lawfully in the territory of a State Party to the present Covenant ... shall, except where compelling reasons of national security otherwise require, *be allowed to submit the reasons against his expulsion*"[165] (emphasis added). The same right is to be found in article 7 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144 of 13 December 1985, which provides that "[a]n alien lawfully in the territory of a State ... shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled". At the regional level, article 1, paragraph 1 (a) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that an alien lawfully resident in the territory of a State and subject to an expulsion order shall

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[162] *Règles internationales sur l'admission et l'expulsion des étrangers*, [International Regulations on the Admission and Expulsion of Aliens] adopted on 9 September 1892, at the Geneva session of the Institute of International Law, art. 30. [French original]

[163] *Ibid.*, art. 31.

[164] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 649.

[165] See Human Rights Committee, communication No. 193/1985, *Pierre Giry v. Dominican Republic*, Views adopted on 20 July 1990, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. II (A/45/40 (Vol. II)), pp. 40–41, para. 5.5. The Committee found that the Dominican Republic had violated article 13 of the Covenant by not taking its decision "in accordance with law" and by also omitting to afford the person concerned an opportunity to submit the reasons against his expulsion and have his case renewed by a competent authority.

be allowed "to submit reasons against his expulsion". Article 3, paragraph 2, of the European Convention on Establishment offers the same safeguard by providing that "[e]xcept where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion". Lastly, the right of an alien to contest his or her expulsion is also embodied in internal law.[166]

(4) The right to be heard by a competent authority, set out in paragraph 1 (c), is essential for the exercise of the right to challenge an expulsion decision, which forms the subject of paragraph 1 (b). Although article 13 of the International Covenant on Civil and Political Rights does not expressly grant the alien the right to be heard, the Human Rights Committee has taken the view that an expulsion decision adopted without the alien having been given an opportunity to be heard may raise questions under article 13 of the Covenant:

> "The Committee is also concerned that the Board of Immigration and the Aliens Appeals Board may in certain cases yield their jurisdiction to the Government, resulting in decisions for expulsion or denial of immigration or asylum status without the affected individuals having been given an appropriate hearing. In the Committee's view, this practice may, in certain circumstances, raise questions under article 13 of the Covenant."[167]

The national laws of several States grant aliens the right to be heard during expulsion proceedings, as do many national tribunals.[168] Given the divergence in State practice in this area, it cannot be said that international law gives an alien subject to expulsion the right to be heard in person by the competent authority. What is required is that an alien be furnished with an opportunity to explain his or her situation and submit his or her own reasons before the competent authority. In some circumstances, written proceedings may satisfy the requirements of international law. One writer, commenting on the decisions of the Human Rights Committee concerning cases related to articles 13 and 14 of the Covenant, expressed the opinion that "[e]ven though the reasons against a pending expulsion should, as a rule, be asserted in an oral hearing, Article 13 does not, in contrast to Article 14, paragraph 3 (d), give rise to a right to personal appearance."[169]

(5) Paragraph 1 (d) sets out the right of access to effective remedies to challenge the expulsion decision. While article 13 of the International Covenant on Civil and Political Rights entitles an alien lawfully present in the expelling State to a review of the expulsion decision, it does not specify the type of authority which should undertake the review:

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[166] See, for example, France, Code on the Entry and Stay of Aliens and on the Right to Asylum, arts. L.522-1 and L522-2; and Sweden, Aliens Act (SFS 2005:716), chapter 14. See also the above-cited memorandum by the Secretariat (A/CN.4/565), para. 618.

[167] Concluding observations of the Human Rights Committee: Sweden, 1 November 1995, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), para. 88.

[168] See, for example, France, Code on the Entry and Stay of Aliens and on the Right to Asylum, arts. L. 213-2,L.512-1, L.522-1 and L.524-1; and Sweden, Aliens Act (SFS 2005:716), article 13.3; See also the above-cited memorandum by the Secretariat (A/CN.4/565), para. 618.

[169] Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, 2nd revised ed. (Kehl am Rhein, N.P. Engel Publisher, 2005), p. 297 (citing communications No. 173/1984, *M.F. v. The Netherlands*, para. 4; No. 236/1987, *V.M.R.B. v. Canada*; No. 155/1983, *Eric Hammel v. Madagascar*, paras. 19.2 and 20; and No. 193/1985, *Pierre Giry v. Dominican Republic*, paras. 5.5 and 6).

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed … *to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*"[170] (emphasis added).

The Human Rights Committee has drawn attention to the fact that the right to a review, as well as the other guarantees provided in article 13, may be departed from only if "compelling reasons of national security" so require. The Committee has also stressed that the remedy at the disposal of the alien expelled must be an effective one:

> "An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require."[171]

The Human Rights Committee has also considered that protests lodged with the expelling State's diplomatic or consular missions abroad are not a satisfactory solution under article 13 of the International Covenant on Civil and Political Rights:

> "In the Committee's opinion, the discretionary power of the Minister of the Interior to order the expulsion of any alien, without safeguards, if security and the public interest so require poses problems with regard to article 13 of the Covenant, particularly if the alien entered Syrian territory lawfully and has obtained a residence permit. Protests lodged by the expelled alien with Syrian diplomatic and consular missions abroad are not a satisfactory solution in terms of the Covenant."[172]

Article 13 of the European Convention on Human Rights recognizes a right to an effective remedy with respect to a violation of any right or freedom set forth in the Convention, including in cases of expulsion:[173]

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[170] Human Rights Committee, communication No. 193/1985, *Pierre Giry v. Dominican Republic*, Views adopted on 20 July 1990, para. 5.5. (The Committee found that the Dominican Republic had violated article 13 of the Covenant by omitting to afford the person concerned an opportunity to have his case reviewed by a competent authority.)

[171] Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 10. In *Eric Hammel v. Madagascar* (communication No. 155/1983, Views adopted on 3 April 1987, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40* (A/42/40), p. 138, para. 19.2), the Committee considered that the claimant had not been given an effective remedy to challenge his expulsion. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 666–667, para. 74.

[172] Concluding observations of the Human Rights Committee: Syrian Arab Republic, 5 April 2001 *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), para. 82 (22), p. 75.

[173] In contrast, the applicability of article 6 of the European Convention on Human Rights in cases of expulsion is less clear. "When no right under the Convention comes into consideration, only the procedural guarantees that concern remedies in general are applicable. While Article 6 only refers to remedies concerning 'civil rights and obligations' and 'criminal charges', the Court has interpreted the provision as including also disciplinary sanctions. Measures such as expulsion that significantly affect individuals should also be regarded as covered" (Giorgio Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, pp. 309–310).

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

In respect of a complaint based on article 3 of the European Convention on Human Rights concerning a case of expulsion, the European Court of Human Rights said the following about the effective remedy to which article 13 refers:

> "In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State."[174]

Article 1 of Protocol No. 7 to the European Convention on Human Rights grants the alien subject to expulsion the right to have his or her case reviewed by a competent authority:

> "Article 1 – Procedural safeguards relating to expulsion of aliens
>
> 1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> …
>
> b. to have his case reviewed, and
>
> …
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

Similarly, article 3, paragraph 2 of the European Convention on Establishment provides:

> "Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to *appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority*" (emphasis added).

Article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; article 32, paragraph 2, of the Convention relating to the Status of Refugees; article 31, paragraph 2, of the Convention relating to the Status of Stateless Persons; article 9, paragraph 5, of the European Convention on the Legal Status of Migrant Workers;[175] and article 26, paragraph 2, of the Arab Charter on Human Rights also require that there be a possibility of appealing against an expulsion decision. This right to a review procedure has also been recognized, in terms which are identical to those of article 13 of the International Covenant on Civil and Political Rights, by the General Assembly in article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144:

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[174] European Court of Human Rights, *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 151.

[175] European Convention on the Legal Status of Migrant Workers, Strasbourg, 24 November 1977, United Nations, *Treaty Series*, vol. 1496, No. 25700, p. 7.

> "An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and *to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority*" (emphasis added).

In its General Recommendation No. 30, the Committee on the Elimination of Racial Discrimination stressed the need for an effective remedy in the event of expulsion and recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination should:

> "Ensure that … non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies."[176]

The requirement that the alien subject to expulsion be provided with a review procedure has also been stressed by the African Commission on Human and Peoples' Rights with respect to illegal immigrants:

> "The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law."[177]

Similarly, in another case, the African Commission on Human and Peoples' Rights held that Zambia had violated the African Charter on Human and Peoples' Rights by not giving an individual the opportunity to challenge an expulsion order:

> "36. Zambia has contravened Article 7 of the Charter in that he was not allowed to pursue the administrative measures, which were opened to him in terms of the Citizenship Act … By all accounts, Banda's residence and status in Zambia had been accepted. He had made a contribution to the politics of the country. The provisions of Article 12 (4) have been violated.
>
> …
>
> 38. John Lyson Chinula was in an even worse predicament. He was not given any opportunity to contest the deportation order. Surely, government cannot say that Chinula had gone underground in 1974 having overstayed his visiting permit. Chinula, by all account, was a prominent businessman and politician. If government wished to act against him they could have done so. That they did not, does not

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[176] Committee on the Elimination of Racial Discrimination, General Recommendation No. 30, para. 25. See also the Committee's concluding observations concerning France, 1 March 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 18* (A/49/18), para. 144 (right of appeal).

[177] African Commission on Human and Peoples' Rights, communication No 159/96, *Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Angola*, Eleventh Annual Activity Report, 1997–1998, para. 20.

> justify the arbitrary nature of the arrest and deportation on 31 August 1994. He was entitled to have his case heard in the Courts of Zambia. Zambia has violated Article 7 of the Charter.
>
> …
>
> 52. Article 7 (1) states that:
>
> 'Every individual shall have the right to have his cause heard …
>
> (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed …'.
>
> 53. The Zambia government by denying Mr. Chinula the opportunity to appeal his deportation order has deprived him of a right to a fair hearing, which contravenes all Zambian domestic laws and international human rights laws."[178]

(6) Paragraph 1 (e), the content of which is based on article 13 of the International Covenant on Civil and Political Rights, gives an alien subject to expulsion the right to be represented before the competent authority. From the standpoint of international law, this right does not necessarily encompass the right to be represented by a lawyer during expulsion proceedings. In any case, it does not encompass an obligation on the expelling State to pay the cost of representation.

(7) The right of an alien to the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority, which is set out in paragraph 1 (f) and recognized in the legislation of a number of States,[179] is an essential element of the right to be heard, which is set out in paragraph 1 (c). It is also of some relevance to the right to be notified of the expulsion decision and the right to challenge that decision, to which paragraphs 1 (a) and (b) of this draft article refer. In this connection, it will be noted that the Committee on the Rights of the Child expressed concerns at reports of "ill-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to … interpretation."[180] Free interpretation is vital to the effective exercise by the alien in question of all of his or her procedural rights. In this context, the alien must inform the competent authorities of the language(s) which he or she is able to understand. However, the right to the free assistance of an interpreter should not be construed as including the right to the translation of possibly voluminous documentation, or to interpretation into a language which is not commonly used in the region where the State is located or at the international level, provided that this can be done without impeding the fairness of the hearing. The wording of paragraph 1 (f) is based on article 14, paragraph 1 (f), of the International Covenant on Civil and Political Rights, which makes provision for that right in the context of criminal proceedings.

(8) Under general international law the expelling State must respect the procedural rights set forth in draft article 26, paragraph 1. Moreover, paragraph 2 specifies that the procedural rights listed in paragraph 1 are without prejudice to other procedural rights or

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[178] African Commission on Human and Peoples' Rights, communication No. 212/98, *Amnesty International v. Zambia*, Twelfth Annual Activity Report, 1998–1999.

[179] See, for example, France, Code on the Entry and Stay of Aliens and on the Right to Asylum, articles L111-8, L221-4, L512-2, L522-2; Spain, Organic Law 4/2000 (11 January 2000) concerning the rights and liberties of foreigners in Spain and their social integration, modified by Organic Law 2/2009 (11 December 2009), art. 63.3; and Sweden, Administrative Act (SFS 1986:223), art. 8 and Alien Act (SFS 2005:716), art. 13:11 See also the above-cited memorandum by the Secretariat (A/CN.4/565), para. 645.

[180] Concluding observations of the Committee on the Rights of the Child: Spain, 7 June 2002, (CRC/C/15/Add.185), para. 45 (a).

guarantees provided by law. This refers primarily to the rights or guarantees that the expelling State's legislation offers aliens (for example, possibly a right to free legal assistance)[181], which that State would be bound to respect by virtue of its international legal obligation to comply with the law throughout the expulsion procedure.[182] In addition, paragraph 2 should be understood to preserve any other procedural right an alien subject to expulsion may enjoy under a rule of international law, in particular one laid down in a treaty, which is binding on the expelling State.

(9) Draft article 26, paragraph 3, deals with consular assistance, the purpose of which is to safeguard respect for the rights of an alien subject to expulsion. This paragraph refers to the alien's right to *seek* consular assistance, which is not synonymous with a right to obtain that assistance. From the standpoint of international law, the alien's State of nationality remains free to decide whether or not to furnish him or her with assistance, and the draft article does not address the question of the possible existence of a right to consular assistance under that State's internal law. At the same time, the expelling State is bound, under international law, not to impede the exercise by an alien of his or her right to seek consular assistance or, as the case may be, the provision of such assistance by the sending State. The right of an alien subject to expulsion to seek consular assistance is also expressly embodied in some national legislation.[183]

(10) The consular assistance referred to in draft article 26, paragraph 3, encompasses the various forms of assistance which the alien subject to expulsion might receive from his or her State of nationality in conformity with the rules of international law on consular relations, which are essentially reflected in the Vienna Convention on Consular Relations of 24 April 1963.[184] The right of the alien concerned to seek consular assistance and the obligations of the expelling State in that context must be ascertained in the light of those rules. Particular mention should be made of article 5 of the Convention, which lists consular functions, and of article 36, which concerns communication between consular officials and nationals of the sending State. Article 36, paragraph 1 (a), guarantees freedom of communication in very general terms, which suggests that it is a guarantee that applies fully in expulsion proceedings. Moreover the same guarantee is set forth in equally general terms in article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144.[185] Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations,

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[181] With respect to the right of the expellee to be granted legal aid, see, *inter alia*, the relevant legislation of the European Union, in particular Council Directive 2003/109/EC of 25 November 2003, dealing with the situation of third country nationals who are long-term residents. Article 12 of the Directive provides:

> "4. Where an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident in the Member State concerned.
>
> "5. Legal aid shall be given to long-term residents lacking adequate resources, on the same terms as apply to nationals of the State where they reside." (European Union, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44–53).

[182] See draft article 4 above and the commentary thereto.

[183] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 631. See also the first addendum to the Special Rapporteur's sixth report (A.CN.4/625/Add.1), paras. 97–102.

[184] Vienna Convention on Consular Relations, 24 April 1963, United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.

[185] This provision reads: "Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides."

which concerns a person who has been committed to prison or to custody pending trial, or who has been detained in any other manner, requires the receiving State to inform the consular post if the person concerned so requests and to inform the person of his or her rights in that respect. Paragraph 1 (c) states that consular officials shall have the right to visit a national of the sending State who has been placed in detention. The International Court of Justice has applied article 36 of the Vienna Convention on Consular Relations in contexts other than that of the expulsion of aliens, for example in the cases concerning *La Grand and Avena and Other Mexican Nationals*.[186] The Court noted that "Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending State"[187] and that "[t]he clarity of these provisions, viewed in their context, admits of no doubt".[188] The Court again examined this question in relation to detention for the purposes of expulsion in its Judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo*. In accordance with the precedent established in the case concerning *Avena and Other Mexican Nationals*,[189] the Court noted that it is for the authorities of the State which proceeded with the arrest:

> "to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect ... Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights 'without delay'."[190]

Having noted that the Democratic Republic of the Congo had not provided "the slightest piece of evidence" to corroborate its assertion that it had orally informed Mr. Diallo of his rights, the Court found that there had been a violation by that State of article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations.[191]

(11) Paragraph 4 concerns aliens who have been unlawfully present in the territory of the expelling State for a brief duration. It takes the form of a "without prejudice" clause which, in such cases, seeks to preserve the application of any legislation of the expelling State concerning the expulsion of such persons. Several States' national laws make provision for simplified procedures for the expulsion of aliens unlawfully present in their territory. Under these procedures such aliens often do not even have the right to challenge their expulsion, let alone the procedural rights enumerated in paragraph 1, whose purpose is to give effect to that right. This being so, as an exercise in the progressive development of international law the Commission considered that even foreigners unlawfully present in the territory of the expelling State for a specified minimum period of time should have the procedural rights

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[186] *LaGrand (Germany v. United States of America)*, Judgment , *I.C.J. Reports 2001*, p. 466, at pp. 489–498 paras. 64–91; *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004*, p. 12, at pp. 39-57 paras. 49–114.

[187] *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466, at p. 494 para. 77.

[188] *Ibid.*

[189] Judgment, *I.C.J. Reports 2004*, p. 12, at p. 46, para. 76.

[190] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, *I.C.J. Reports 2010*, p. 672, para. 95.

[191] *Ibid.*, p. 673, paras. 96 and 97.

listed in paragraph 1. According to the legislation of some countries, this period of time must not exceed six months.[192]

### Article 27
### Suspensive effect of an appeal against an expulsion decision

An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision when there is a real risk of serious irreversible harm.

### Commentary

(1) Draft article 27, which formulates the suspensive effect of an appeal lodged against an expulsion decision by an alien lawfully present in the territory of the expelling State, is progressive development of international law. State practice in the matter is not sufficiently uniform or convergent to form the basis, in existing law, of a rule of general international law providing for the suspensive effect of an appeal against an expulsion decision when there is a real risk of serious irreversible harm to the alien subject to expulsion.

(2) However, the formulation of a suspensive effect in a draft article is nevertheless warranted. One of the reasons militating in favour of a suspensive effect is certainly the fact that, unless the execution of the expulsion decision is stayed, an appeal might well be ineffective in view of the potential obstacles to return, including those of an economic nature, which might be faced by an alien who in the intervening period has had to leave the territory of the expelling State as a result of an expulsion decision, the unlawfulness of which was determined only after his or her departure.

(3) In this context, it is interesting to note the position of the European Court of Human Rights regarding the effects of an appeal on the execution of the decision. While the Court recognized the discretion enjoyed by States parties in this respect, it indicated that measures whose effects are potentially irreversible should not be enforced before the national authorities have determined whether they are compatible with the Convention. For example, in the case of *Čonka v. Belgium* the Court concluded that there had been a violation of article 13 of the Convention:

> "The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible … . Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision."[193]

(4) One might also mention that the Parliamentary Assembly of the Council of Europe has recommended that aliens expelled from the territory of a member State of the Council of Europe should be entitled to a suspensive appeal, which should be considered within three months from the date of the decision on expulsion:

> "With regard to expulsion: ii. any decision to expel a foreigner from the territory of a Council of Europe member state should be subject to a right of suspensive appeal;

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[192] See the discussion of this point in the first addendum to the Special Rapporteur's sixth report (A.CN.4/625/Add.1), paras. 17–40.

[193] European Court of Human Rights, *Čonka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 79; See also European Court of Human Rights, *A.C. and others v. Spain*, Judgment, 22 April 2014, Application No. 6528/11, para. 88.

> iii. if an appeal against expulsion is lodged, the appeal procedure shall be completed within three months of the original decision to expel".[194]

In this context it is interesting to note that the Parliamentary Assembly also took the view that an alien who was not lawfully present also had this right of appeal:

> "An alien without a valid residence permit may be removed from the territory of a member state only on specified legal grounds which are other than political or religious. He shall have the right and the possibility of appealing to an independent appeal authority before being removed. It should be studied if also, or alternatively, he shall have the right to bring his case before a judge. He shall be informed of his rights. If he applies to a court or to a high administrative authority, no removal may take place as long as the case is pending;
>
> A person holding a valid residence permit may only be expelled from the territory of a member state in pursuance of a final court order."[195]

The Commission did not go as far as this.

### Article 28
### International procedures for individual recourse

An alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

**Commentary**

The purpose of draft article 28 is to make it clear that aliens subject to expulsion may, in some cases, be entitled to individual recourse to a competent international body. The individual recourse procedures in question are mainly those established under various universal and regional human rights instruments.

## Part Five
## Legal consequences of expulsion

### Article 29
### Readmission to the expelling State

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

**Commentary**

(1) Draft article 29 states, as an exercise in progressive development and when certain conditions are met, that an alien who has had to leave the territory of a State owing to an unlawful expulsion has the right to re-enter the territory of the expelling State. Although

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[194] Parliamentary Assembly of the Council of Europe, Recommendation 1624 (2003), Common policy on migration and asylum, 30 September 2003, para. 9.

[195] Parliamentary Assembly of the Council of Europe, Appendix to Recommendation 769 (1975) on the legal status of aliens, 3 October 1975, paras. 9–10.

such a right — with a variety of conditions — may be discerned in the legislation of some States[196] and even at the international level,[197] practice does not appear to converge enough for it to be possible to affirm the existence, in positive law, of a right to readmission, as an individual right of an alien who has been unlawfully expelled.

(2) Even from the standpoint of progressive development, the Commission was cautious about formulating any such right. Draft article 29 therefore concerns solely the case of an alien lawfully present in the territory of the State in question who has been expelled unlawfully and applies only when a competent authority has established that the expulsion was unlawful and when the expelling State cannot validly invoke one of the reasons mentioned in the draft article as grounds for refusing to readmit the alien in question.

(3) The adjective "unlawful" qualifying expulsion in the draft article refers to any expulsion in breach of a rule of international law. It must also, however, be construed in the light of the principle, set forth in article 13 of the International Covenant on Civil and Political Rights and reiterated in draft article 4, that an alien may be expelled only in pursuance of a decision reached in accordance with law, that is to say primarily in accordance with the internal law of the expelling State.

(4) Under draft article 29, a right of readmission applies only in situations where the authorities of the expelling State, or an international body such as a court or a tribunal which is competent to do so, have found in a binding determination that expulsion was unlawful. Such a determination is not present when an expulsion decision which was unlawful at the moment when it was taken is held by the competent authorities to have been cured in accordance with the law. The Commission considered that it would have been inappropriate to make the recognition of this right subject to the annulment of the unlawful expulsion decision, since in principle only the authorities of the expelling State are competent to annul such a decision. The wording of draft article 29 also covers situations where expulsion has occurred without the adoption of a formal decision, in other words through conduct attributable to the expelling State.[198] That said, by making the right of readmission subject to the existence of a prior determination by a competent authority as to the unlawfulness of the expulsion, draft article 29 avoids giving the alien, in this context, the right to judge for him or herself whether the expulsion to which he or she has been subject was lawful or unlawful.

(5) Draft article 29 should not be understood as conferring on the determinations of international bodies legal effects other than those for which provision is made in the instrument by which the body in question was established. It recognizes only, as a matter of progressive development, and on an independent basis, a right to readmission to the territory of the expelling State, the existence of which right is subject, *inter alia*, to a previous binding determination that the expulsion was unlawful.

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[196] See, for example, France, Code on the Entry and Stay of Aliens and on the Right to Asylum, art. L524-4.

[197] The Inter-American Commission on Human Rights in effect recognized the existence of this right in a case involving the arbitrary expulsion of a foreign priest, in that it resolved:

> "To recommend to the government of Guatemala: a) that Father Carlos Stetter be permitted to return to the territory of Guatemala and to reside in that country if he so desires; b) that it investigate the acts reported and punish those responsible for them; and c) that it inform the Commission in 60 days on the measures taken to implement these recommendations" (Inter-American Commission on Human Rights, Resolution 30/81, Case 73/78 (Guatemala), 25 June 1981, *Annual Report of the Inter-American Commission on Human Rights 1980–1981*, OEA/Ser.L/V/II.54, doc. 9 rev.1, 16 October 1981).

[198] See in this connection draft article 10 above, which prohibits all forms of disguised expulsion.

(6) As this draft article clearly indicates, the expelling State retains the right to deny readmission to an alien who has been unlawfully expelled, if that readmission constitutes a threat to national security or public order or if, for any other reason, the alien no longer fulfils the conditions for admission under the law of the expelling State. It is necessary to allow such exceptions to readmission in order to preserve a fair balance between the rights of the unlawfully expelled alien and the power of the expelling State to control the entry of any alien to its territory in accordance with its legislation in force when a decision is to be taken on the readmission of the alien in question. The purpose of the final exception mentioned in draft article 29 is to take account of the fact that, in some cases, the circumstances or facts forming the basis on which an entry visa or residence permit was issued to the alien might no longer exist. A State's power to assess the conditions for readmission must, however, be exercised in good faith. For example, the expelling State would not be entitled to refuse readmission on the basis of legislative provisions which made the mere existence of a previous expulsion decision that was revealed to be unlawful a bar to readmission. This restriction is reflected in draft article 29, paragraph 2, which states: "In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted." This formulation draws on the wording of article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[199]

(7) Lastly, the formulation of a right to readmission under draft article 29 is without prejudice to the legal regime governing the responsibility of States for internationally wrongful acts, to which reference is made in draft article 30. In particular, the legal rules governing reparation for an internationally wrongful act remain relevant in the context of the expulsion of aliens.

### Article 30
### Responsibility of States in cases of unlawful expulsion

The expulsion of an alien in violation of the expelling State's obligations set forth in the present draft articles or any other rule of international law entails the international responsibility of that State.

### Commentary

(1) It is undisputed that an expulsion in violation of a rule of international law entails the international responsibility of the expelling State for an internationally wrongful act. In this regard, draft article 30 is to be read in the light of Part Two of the articles on the responsibility of States for internationally wrongful acts.[200] Part Two sets out the content of the international responsibility of a State, including in the context of the expulsion of aliens.[201]

(2) The fundamental principle of full reparation by the State of the injury caused by an internationally wrongful act is stated in article 31 of the articles on State responsibility,[202]

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[199] The provision reads: "If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the *earlier decision shall not be used to prevent him or her from re-entering the State concerned*" (emphasis added).

[200] See *Yearbook … 2001*, vol. II (Part Two), pp. 86–116.

[201] See para. (5) of the general commentary to the Commission's articles on the responsibility of States for internationally wrongful acts; *Yearbook … 2001*, vol. II (Part Two), p. 32.

[202] Article 31 reads as follows: "Article 31 – Reparation: 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

while article 34[203] sets out the various forms of reparation, namely restitution (article 35), compensation (article 36) and satisfaction (article 37). The jurisprudence on reparation in cases of unlawful expulsion is particularly abundant.[204]

(3) Restitution, in the form of the return of the alien to the expelling State, has sometimes been chosen as a form of reparation. In this regard, the first Special Rapporteur on international responsibility, Mr. García Amador, stated: "In cases of arbitrary expulsion, satisfaction has been given in the form of the revocation of the expulsion order and the return of the expelled alien."[205] He was referring, in this context, to the *Lampton* and *Wiltbank* cases (concerning two United States citizens expelled from Nicaragua in 1894) and the case of four British subjects also expelled from Nicaragua.[206] The return in a case of unlawful expulsion has been ordered by the Inter-American Commission on Human Rights in connection with the arbitrary expulsion of a foreign priest.[207]

(4) Compensation is a well-recognized means of reparation for the injury caused by an unlawful expulsion to the alien expelled or to the State of nationality. It is not disputed that the compensable injury includes both material and moral damage.[208] A new approach was

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[203] Article 34 reads as follows: "Article 34 – Forms of reparation: Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

[204] See, for example, *Paquet Case (Expulsion)*, Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, pp. 323–325, at p. 325 (Filtz, Umpire); *Oliva Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 600–609; *Maal* Case, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 730–733; *Daniel Dillon (U.S.A.) v. United Mexican States*, Mexico-U.S.A. General Claims Commission, Award of 3 October 1928, United Nations, *Reports of International Arbitral Awards*, vol. IV, pp. 368–371; *Yeager v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 92–113; *Case of Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), European Court of Human Rights, 18 February 1991, Application No. 12313/86; *Case of Conka v. Belgium*, Judgment (Merits and Just Satisfaction), European Court of Human Rights, 5 February 2002, Application No. 51564/99.

[205] International responsibility: sixth report by F.V. García Amador, Special Rapporteur (Responsibility of the State for injuries caused in its territory to the person or property of aliens – Reparation of the injury), *Yearbook … 1961*, vol. II, A/CN.4/134 and Add.1, para. 99.

[206] *Ibid.*, para. 99, footnote 159. These cases are mentioned by John Bassett Moore in *A Digest of International Law*, Washington, Government Printing Office, vol. IV, 1906, pp. 99–101. Lampton and Wiltbank had been expelled by the Government of Nicaragua and then allowed to return to Nicaragua at the request of the United States. As for the four British subjects, Great Britain had demanded "the unconditional cancellation of the decrees of expulsion" and Nicaragua had replied that "there was no occasion for the revocation of the decree of expulsion, as all the persons guilty of taking part in the Mosquito rebellion had been pardoned".

[207] "The Inter-American Commission on Human Rights resolves: ... 3. To recommend to the Government of Guatemala: (a) that Father Carlos Stetter be permitted to return to the territory of Guatemala and to reside in that country if he so desires; (b) that it investigate the acts reported and punish those responsible for them; and (c) that it inform the Commission in 60 days on the measures taken to implement these recommendations" (Inter-American Commission on Human Rights, Resolution 30/81, Case 7378 (Guatemala), 25 June 1981, *Annual Report of the Inter-American Commission on Human Rights 1980–1981*, OEA/Ser.L/V/II.54, doc. 9, rev. 1, 16 October 1981).

[208] See, on this issue, for example, *Case of Emre v. Switzerland*, application No. 5056/10, European Court of Human Rights, 22 May 2008, or *Case of the "Mapiripán Massacre"*, Inter-American Court of Human Rights, Series C, No. 134, 7 March 2005, and Pueblo Bello See also, in this connection, the Judgment of 19 June 2012 rendered by the International Court of Justice in the *Ahmadou Sadio Diallo* case, which is discussed in para. (6) below.

taken by the Inter-American Court of Human Rights to the right to reparation by including interruption of the life plan in the category of harm suffered by victims of violations of human rights.[209]

Damages have been awarded by a number of arbitral tribunals to aliens who had been victims of unlawful expulsions. In the *Paquet* case, the umpire held that, given the arbitrary nature of the expulsion, the Government of Venezuela should pay Mr. Paquet compensation for the direct damages he had suffered:

> "… the general practice amongst governments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation, which is aggravated in the present case by the fact that the attributes of the executive power, according to the Constitution of Venezuela, do not extend to the power to prohibit the entry into the national territory, or expelling therefrom the domiciled foreigners whom the Government suspects of being prejudicial to the public order;
>
> That, besides, the sum demanded does not appear to be exaggerated:
>
> Decides that N.A. Paquet is entitled to an indemnity of 4,500 francs."[210]

Damages were also awarded by the umpire in the *Oliva* case to compensate the loss resulting from the breach of a concession contract, although these damages were limited to those related to the expenditures which the alien had incurred and the time he had spent in order to obtain the contract.[211] Commissioner Agnoli had considered that the arbitrary nature of the expulsion would by itself have justified a demand for damages:

> "[A]n indemnity of not less than 40,000 bolivars should be conceded, independently of any sum which might justly be found due him for losses resulting from the arbitrary rupture of the contract aforementioned, since there can be no doubt that, even had he not obtained the concession referred to, the sole fact of his arbitrary expulsion would furnish sufficient ground for a demand of indemnity."[212]

In other cases, it was the unlawful manner in which the expulsion had been carried out (including the duration and conditions of a detention pending deportation) that gave rise to compensation. In the *Maal* case, the umpire awarded damages to the claimant because of the harsh treatment he had suffered. Given that the individuals who had carried out the deportation had not been punished, the umpire considered that the sum awarded needed to be sufficient in order for the State responsible to "express its appreciation of the indignity" inflicted on the claimant:

> "The umpire has been taught to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for

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[209] See, *inter alia*, the judgments rendered in the following cases: *Loayza Tamayo v. Peru*, Judgment of 27 November 1998 (Reparations and costs), Series C, No. 42, paras. 144–154; *Cantoral Benavides*, Judgment of 3 December 2001 (Reparations and costs), Series C, No. 88, paras. 60 and 80; *Gutiérrez Soler v. Colombia*, Judgment of 12 September 2005 (Merits, reparations and costs), Series C, No. 132, paras. 87–89.

[210] *Paquet* case, Belgium-Venezuela Mixed Claims Commission, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, p. 325.

[211] *Oliva* case, Italy-Venezuela Mixed Claims Commission, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 607 to 609 (Ralston, umpire), containing details about the calculation of damages in the particular case.

[212] *Oliva* case, *ibid.*, p. 602 (Agnoli, commissioner).

> which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted. [...] And since there is no proof or suggestion that those in discharge of this important duty of the Government of Venezuela have been reprimanded, punished or discharged, the only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefor in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practiced upon this subject and its high desire to fully discharge such obligation. In the opinion of the umpire the respondent Government should be held to pay the claimant Government in the interest of and on behalf of the claimant, solely because of these indignities the sum of five hundred dollars in gold coin of the United States of America, or its equivalent in silver at the current rate of exchange at the time of the payment; and judgment may be entered accordingly."[213]

In the *Daniel Dillon* case, damages were awarded to compensate maltreatment inflicted on the claimant due to the duration and conditions of his detention:

> "The long period of detention, however, and the keeping of the claimant *incommunicado* and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law. And it is found that the sum in which an award should be made, can be properly fixed at $2,500, U.S. currency, without interest."[214]

In the *Yaeger* case, the Iran-United States Claims Tribunal awarded the claimant compensation for (1) the loss of personal property that he had to leave behind because he had not been given sufficient time to leave the country;[215] and (2) for the money seized at the airport by the "Revolutionary Komitehs".[216]

In some instances, the European Court of Human Rights has awarded a sum of money as compensation for non-pecuniary damages resulting from an unlawful expulsion. In *Moustaquim v. Belgium*, the Court disallowed a claim for damages based on the loss of earnings resulting from an expulsion in violation of article 8 of the European Convention on Human Rights, citing the absence of a causal link between the violation and the alleged loss of earnings. However, the Court awarded the applicant, on an equitable basis, 100,000 Belgian francs as a compensation for non-pecuniary damages for the period that he had to live away from his family and friends, in a country where he had no ties.[217] In the *Čonka v. Belgium* case, the European Court of Human Rights awarded the sum of 10,000 euros to compensate non-pecuniary damages resulting from a deportation which had violated articles 5, paragraphs 1 and 4, of the European Convention on Human Rights (right to liberty and security), article 4 of Protocol No. 4 to that Convention (prohibition of collective expulsion), as well as article 13 of the Convention (right to an effective remedy) taken in conjunction with article 4 of Protocol No. 4.[218]

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[213] *Maal* case, Netherlands-Venezuela Mixed Claims Commission, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 732 and 733 (Plumley, umpire).

[214] *Daniel Dillon (United States of America ) v. United Mexican States*, Mexico-U.S.A. General Claims Commission, Award of 3 October 1928, United Nations, *Reports of International Arbitral Awards*, vol. IV, p. 369.

[215] *Yeager v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 107 to 109, paras. 51–59.

[216] *Ibid.*, p. 110, paras. 61–63.

[217] *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, paras. 52 to 55.

(5) Satisfaction as a form of reparation is addressed in article 37 of the articles on State responsibility. It is likely to be applied in the case of an unlawful expulsion, particularly in situations where the expulsion decision has not yet been executed. In such cases, the European Court of Human Rights considered that a judgment determining the unlawfulness of the expulsion order was an appropriate form of satisfaction and therefore abstained from awarding non-pecuniary damages. Attention may be drawn in this respect to *Beldjoudi v. France*,[219] *Chahal v. United Kingdom*[220] and *Ahmed v. Austria*.[221] It is relevant to recall in this connection that the Commission itself, in its commentary to article 37 of the articles on State responsibility, stated: "One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal."[222] Again with respect to satisfaction as a form of reparation, it should be noted that the Inter-American Court of Human Rights does not limit itself to awarding compensation to victims of unlawful expulsion, considering that "the reparations that must be made by the State necessarily include effectively investigating the facts [and] punishing all those responsible".[223]

(6) The question of reparation for internationally wrongful acts related to the expulsion of an alien was addressed by the International Court of Justice in its judgment of 30 November 2010 in the *Ahmadou Sadio Diallo* case:

> "Having concluded that the Democratic Republic of the Congo has breached its obligations under Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples' Rights, and article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 above), it is for the Court now to determine, in light of Guinea's final submissions, what consequences flow from

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[218] *Čonka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 42.

[219] *Beldjoudi v. France*, Judgment (Merits and Just Satisfaction), 26 March 1992, Application No. 12083/86, para. 86: "The applicants must have suffered non-pecuniary damages, but the present judgment provides them with sufficient compensation in this respect." The Court added that there would have been a violation of article 8 of the Convention "if the decision to expel Mr. Beldjoudi [had been] implemented" (operative para. 1).

[220] *Chahal v. United Kingdom, Judgment (Merits and Just Satisfaction)*, 15 November 1996, Application No. 22414/93, para. 158: "In view of its decision that there has been no violation of Article 5, para. 1 ..., the Court makes no award for non-pecuniary damages in respect of the period of time Mr. Chahal has spent in detention. As to the other complaints, the Court considers that the findings that his deportation, if carried out, would constitute a violation of Article 3 and that there have been breaches of Articles 5, para. 4, and 13 constitute sufficient just satisfaction."

[221] *Ahmed v. Austria, Judgment (Merits and Just Satisfaction)*, 17 December 1996, Application No. 25964/94. The Court disallowed a claim for compensation for loss of earnings because of the lack of a causal connection between the alleged damage and the Court's conclusion with regard to article 3 of the Convention (para. 50). The Court then stated: "The Court considers that the applicant must have suffered non-pecuniary damage but that the present judgment affords him sufficient compensation in that respect" (para. 51). The Court then held: "... for as long as the applicant faces a real risk of being subjected in Somalia to treatment contrary to Article 3 of the Convention there would be a breach of that provision in the event of the decision to deport him there being implemented" (operative para. 2).

[222] Para. (6) of the commentary to art. 37; *Yearbook ... 2001*, vol. II (Part Two), pp. 106–107.

[223] *Bámaca-Velásquez v. Guatemala*, Judgment of 22 February 2002, (Reparations), paras. 73 and 106.

> these internationally wrongful acts giving rise to the DRC's international responsibility."[224]

After recalling the legal regime governing reparation, based on the principle, established by the Permanent Court of International Justice in the case concerning the *Factory at Chorzów*, that the reparation must, as far as possible, "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[225] and the principle, recently recalled in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, that the reparation may take "the form of compensation or satisfaction, or even both",[226] the Court stated:

> "In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation."[227]

Subsequently, on 19 June 2012, the Court handed down a judgment on the question of compensation payable by the Democratic Republic of the Congo to the Republic of Guinea.[228] It awarded the Republic of Guinea compensation of $85,000 for the non-material injury suffered by Mr. Diallo because of the wrongful acts attributable to the Democratic Republic of the Congo,[229] and, on basis of equitable considerations, awarded $10,000 dollars to compensate for Mr. Diallo's alleged loss of personal property.[230] The Court, however, rejected, for lack of evidence, requests for compensation for the loss of remuneration that Mr. Diallo's had allegedly suffered during his detention and following his unlawful expulsion.[231] The Court in its judgment addressed in a general way several points regarding the conditions and manner of compensation, including the causal link between the unlawful acts and the injury, the assessment of the injury — including the non-material injury — and the evidence for the latter.

### Article 31
### Diplomatic protection

The State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of the alien in question.

#### Commentary

(1) Draft article 31 refers to the institution of diplomatic protection, for which the legal regime is well established in international law. It is undisputed that the State of nationality of an alien subject to expulsion can exercise diplomatic protection on behalf of its national, subject to the conditions specified by the rules of international law. Those rules are essentially reflected in the articles on diplomatic protection adopted by the Commission in

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[224] *Ahmadou Sadio Diallo (Republic of Guinea* v *. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 691, para. 160.

[225] Judgment No. 13 (Merits), 1928, *P.C.I.J. Series A, No. 17*, p. 47.

[226] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Merits, Judgment, I.C.J. Reports 2010*, pp. 103–104, para. 273.

[227] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 691, p. 639, at para. 161.

[228] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324.

[229] *Ibid.*, pp. 333–335, paras. 18–25.

[230] *Ibid.*, pp. 335–338 and 343, paras. 26–36 and 55.

[231] *Ibid.*, pp. 338–342, paras. 37–50.

2006, the text of which was annexed by the General Assembly to its resolution 62/67 of 6 December 2007.[232]

(2) In its judgment of 2007 regarding the preliminary objections in the *Diallo* case, the International Court of Justice reiterated, in the context of the expulsion of aliens, two essential conditions for the exercise of diplomatic protection, namely the nationality link and the prior exhaustion of domestic remedies.[233]

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[232] For the text of the articles on diplomatic protection and the commentaries thereto, see the report of the Commission on the work of its fifty-eighth session (2006), *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 50.

[233] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 599, para. 40.

# Chapter V
# Protection of persons in the event of disasters

## A. Introduction

46. From the sixtieth (2008) to sixty-fifth sessions (2013), the Commission considered the topic on the basis of six reports[234] submitted by the Special Rapporteur dealing with, *inter alia*, the main legal questions to be covered, the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, the definition of "disaster" for purposes of the topic, the basic duty to cooperate, the principles that inspire the protection of persons in the event of disasters, the question of the role of the affected State, the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance, the right to offer assistance of the international community, the conditions for the provision of assistance, the question of the termination of assistance, prevention in the context of the protection of persons in the event of disasters, including disaster risk reduction, prevention as a principle of international law, and international cooperation on prevention. The Commission also had before it a memorandum by the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1 to 3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters. The Commission further had before it a set of written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

47. At its sixty-second session (2010), the Commission provisionally adopted draft articles 1 (Scope), 2 (Purpose), 3 (Definition of disaster), 4 (Relationship with international humanitarian law) and 5 (Duty to cooperate).[235] At the sixty-third session (2011), the Commission provisionally adopted draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity), 8 (Human rights), 9 (Role of the affected State), 10 (Duty of the affected State to seek assistance) and 11 (Consent of the affected State to external assistance).[236] At its sixty-fifth session (2013), the Commission provisionally adopted draft articles 5 *bis* (Forms of cooperation), 5 *ter* (Cooperation for disaster risk reduction), 12 (Offers of assistance), 13 (Conditions on the provision of external assistance), 14 (Facilitation of external assistance), 15 (Termination of external assistance) and 16 (Duty to reduce the risk of disasters).[237]

## B. Consideration of the topic at the present session

48. At the present session, the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/668 and Corr.1 and Add.1) dealing with the protection of relief personnel and their equipment and goods, and included a proposal for draft article 14

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[234] See A/CN.4/598, A/CN.4/645 and Corr.1, A/CN.4/629, A/CN.4/643 and Corr.1, A/CN.4/652, and A/CN.4/662.

[235] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 330.

[236] *Ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 228.

[237] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 61.

*bis* (protection of relief personnel, equipment and goods).[238] The report further considered the relationship of the draft articles being developed and other rules, and included proposals for draft articles 17 (Relationship with special rules of international law),[239] 18 (Matters related to disaster situations not regulated by the present draft articles)[240] and 19 (Relationship to the Charter of the United Nations).[241] The report also contained a proposal for draft article 3 *bis* (Use of terms).[242]

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[238] Draft article 14 *bis* read as follows:

**Protection of relief personnel, equipment and goods**

The affected State shall take all necessary measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

[239] Draft article 17 read as follows:

**Relationship with special rules of international law**

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law applicable in disaster situations.

[240] Draft article 18 read as follows:

**Matters related to disaster situations not regulated by the present draft articles**

The applicable rules of international law continue to govern matters related to disaster situations to the extent that they are not regulated by the present draft articles.

[241] Draft article 19 read as follows:

**Relationship to the Charter of the United Nations**

The present draft articles are without prejudice to the Charter of the United Nations.

[242] Draft article 3 *bis* read as follows:

**Use of terms**

For the purposes of the present articles:

(a) "Affected State" means the State upon whose territory persons or property are affected by a disaster;

(b) "Assisting State" means a State providing assistance to an affected State at its request or with its acceptance;

(c) "Other assisting actor" refers to an international organization, non-governmental organization, or any other entity or person, external to the affected State, which is engaged in disaster risk reduction or the provision of disaster relief assistance;

(d) "External assistance" refers to relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors, with the objective of preventing, or mitigating the consequences of disasters or meeting the needs of those affected by a disaster;

(e) "Equipment and goods" includes supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects necessary for the provision of disaster relief assistance and indispensable for the survival and the fulfilment of the essential needs of the victims of disasters;

(f) "Relevant non-governmental organization" means any organization, including private and corporate entities, other than a State or governmental or intergovernmental organization, working impartially and with strictly humanitarian motives, which because of its nature, location or expertise, is engaged in disaster risk reduction or the provision of disaster relief assistance;

(g) "Relief personnel" means specialized personnel, including military personnel, engaged in the provision of disaster relief assistance on behalf of an assisting State or other assisting actor, as appropriate, having at their disposal the necessary equipment and goods;

(h) "Risk of disasters" means the probability of harmful consequences or losses with regard to human life or health, livelihood, property and economic activity, or damage to the environment, resulting from a disaster.

49. The Commission considered the seventh report at its 3198th to 3201st meetings, from 5 to 8 May 2014.

50. At its 3201st meeting, on 8 May 2014, the Commission referred draft articles 3 *bis*, 14 *bis*, 17, 18 and 19 to the Drafting Committee.

51. The Commission considered and adopted the report of the Drafting Committee on draft articles 1 [1] to 21 [4], at the 3213th meeting, held on 30 May 2014. It, accordingly, adopted a set of 21 articles on the protection of persons in the event of disasters on first reading (sect. C.1 below).

52. At its 3238th and 3239th meetings, on 5 and 6 August 2014, the Commission adopted the commentaries to the draft articles on the protection of persons in the event of disasters on first reading (sect. C.2 below).

53. At its 3239th meeting, on 6 August 2014, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles (see sect. C below), through the Secretary-General, to Governments, competent international organizations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2016. The Commission also indicated that it would welcome comments and observations on the draft articles from the United Nations, including the Office for the Coordination of Humanitarian Affairs and the United Nations Office for Disaster Risk Reduction, by the same date.

54. At its 3239th meeting, on 6 August 2014, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Eduardo Valencia Ospina, which had enabled the Commission to bring to a successful conclusion its first reading of the draft articles on the on the protection of persons in the event of disasters.

## C. Text of the draft articles on the protection of persons in the event of disasters adopted by the Commission on first reading

### 1. Text of the draft articles

55. The text of the draft articles adopted by the Commission on first reading is reproduced below.

**Protection of persons in the event of disasters**

**Article 1 [1]**[243]
**Scope**

The present draft articles apply to the protection of persons in the event of disasters.

**Article 2 [2]**
**Purpose**

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

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[243] The numbers of the draft articles, as previously provisionally adopted by the Commission, are indicated in square brackets.

### Article 3 [3]
### Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

### Article 4
### Use of terms

For the purposes of the present draft articles:

(a) "affected State" means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

(b) "assisting State" means a State providing assistance to an affected State at its request or with its consent;

(c) "other assisting actor" means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

(d) "external assistance" means relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction;

(e) "relief personnel" means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction;

(f) "equipment and goods" means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects for disaster relief assistance or disaster risk reduction.

### Article 5 [7]
### Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

### Article 6 [8]
### Human rights

Persons affected by disasters are entitled to respect for their human rights.

### Article 7 [6]
### Humanitarian principles

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

### Article 8 [5]
### Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red

Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

### Article 9 [5 *bis*]
### Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

### Article 10 [5 *ter*]
### Cooperation for disaster risk reduction

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

### Article 11 [16]
### Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

### Article 12 [9]
### Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

### Article 13 [10]
### Duty of the affected State to seek external assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

### Article 14 [11]
### Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer.

### Article 15 [13]
### Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State.

Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

### Article 16 [12]
### Offers of external assistance

In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

### Article 17 [14]
### Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

### Article 18
### Protection of relief personnel, equipment and goods

The affected State shall take the appropriate measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

### Article 19 [15]
### Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actor wishing to terminate shall provide appropriate notification.

### Article 20
### Relationship to special or other rules of international law

The present draft articles are without prejudice to special or other rules of international law applicable in the event of disasters.

### Article 21 [4]
### Relationship to international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

## 2. Text of the draft articles with commentaries thereto

56. The text of the draft articles, together with commentaries thereto, adopted by the Commission on first reading is reproduced below. This text comprises a consolidated version of the commentaries adopted so far by the Commission, including modifications

and additions made to commentaries previously adopted and commentaries adopted at the sixty-sixth session of the Commission.

### Protection of persons in the event of disasters

### Article 1 [1][244]
### Scope

The present draft articles apply to the protection of persons in the event of disasters.

#### Commentary

(1) Draft article 1 [1] establishes the scope of the draft articles, and tracks the formulation of the title of the topic. It establishes the orientation of the draft articles as being primarily focused on the protection of persons whose life, well-being and property are affected by disasters. Accordingly, as established in draft article 2 [2], the focus is on facilitating a response that adequately and effectively meets the essential needs of the persons concerned, while fully respecting their rights.

(2) The draft articles cover, *ratione materiae*, the rights and obligations of States affected by a disaster in respect of persons present on their territory (irrespective of nationality) or under their jurisdiction or control, third States and international organizations and other entities in a position to cooperate, particularly in the provision of disaster relief and assistance. Such rights and obligations are understood to apply on two axes: the rights and obligations of States in relation to one another, and the rights and obligations of States in relation to persons in need of protection. While the focus is on the former, the draft articles also contemplate, albeit in general terms, the rights of individuals affected by disasters, as established by international law. Furthermore, as is elaborated in draft article 3 [3], the draft articles are not limited to any particular type of disaster.

(3) The scope *ratione personae* of the draft articles is limited to natural persons affected by disasters. In addition, the focus is primarily on the activities of States and international organizations and other entities enjoying specific international legal competence in the provision of disaster relief and assistance in the context of disasters. The activities of non-governmental organizations and other private actors, sometimes collectively referred to as "civil society" actors, are included within the scope of the draft articles only in a secondary manner, either as direct beneficiaries of duties placed on States (for example, of the duty of States to cooperate, in draft article 8 [5]) or indirectly, as being subject to the domestic laws implementing the draft articles of the affected State, a third State or the State of nationality of the entity or private actor.

(4) As suggested by the phrase "in the event of" in the title of the topic, the scope of the draft articles *ratione temporis* is primarily focused on the immediate post-disaster response and recovery phase, including the post-disaster reconstruction phase. Nonetheless, the draft articles also, in draft articles 10 [5 *ter*] and 11 [16], where relevant, cover the pre-disaster phase as relating to disaster risk reduction and disaster prevention and mitigation activities.

(5) The draft articles are not limited, *ratione loci*, to activities in the arena of the disaster, but also cover those within assisting States and transit States. Nor is the transboundary nature of a disaster a necessary condition for the triggering of the application of the draft articles. Certainly, it is not uncommon for major disasters to have a transboundary effect, thereby increasing the need for international cooperation and

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[244] The numbers of the draft articles, as previously provisionally adopted by the Commission, are indicated in square brackets.

coordination. Nonetheless, examples abound of major international relief assistance efforts being undertaken in response to disasters occurring solely within the territorial boundaries of a single State, or of those of a territory or area under its jurisdiction or control. While different considerations may arise, unless otherwise specified, no such distinction is maintained in the draft articles. In other words, the draft articles are not tailored with any specific disaster type or situation in mind, but are intended to be applied flexibly to meet the needs arising from all disasters, regardless of their transboundary effect.

### Article 2 [2]
### Purpose

**The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.**

### Commentary

(1) Draft article 2 [2] deals with the purpose of the draft articles. While it is not always the case that texts prepared by the Commission include a provision outlining the objectives of the draft articles in question, it is not unprecedented. The 2006 Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities include a provision (draft article 3 [3]) on purposes.

(2) The provision elaborates on draft article 1 [1] (scope) by providing further guidance on the purport of the draft articles. The main issue raised relates to the juxtaposition of "needs" versus "rights". The Commission was aware of the debate in the humanitarian assistance community on whether a "rights-based" approach as opposed to the more traditional "needs-based" approach was to be preferred, or vice versa. The prevailing sense of the Commission was that the two approaches were not necessarily mutually exclusive, but were best viewed as being complementary. The Commission settled for a formulation that emphasized the importance of a response which adequately and effectively meets the "needs" of persons affected by the disaster. Such response has to take place with full respect for the rights of such persons.

(3) Although not necessarily a term of art, by "adequate and effective", what is meant is a high-quality response that meets the needs of the persons affected by the disaster. Similar formulations are to be found in existing agreements. These include "effective and concerted" and "rapid and effective" found in the ASEAN Agreement on Disaster Management and Emergency Response of 2006, as well as "proper and effective" used in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998. Given the context in which such response is to be provided, an element of timeliness is implicit in the term "effective". The more drawn-out the response the less likely it is that it will be effective. This and other aspects of what makes a response "adequate" and "effective" is the subject of draft article 17 [14]. Notwithstanding this, it is understood that while a high standard is called for, it has, nonetheless, to be based in what is realistic and feasible "on the ground" in any given disaster situation. Hence, no reference is made, for example, to the response having to be "fully" effective.

(4) The Commission decided not to formulate the provision in the form of a general statement on the obligation of States to ensure an adequate and effective response, as it was felt that it would not sufficiently highlight the specific rights and obligations of the affected State. It was not clear, for example, whether such formulation would sufficiently distinguish different obligations for different States, such as for the affected State as opposed to assisting States. Accordingly, a reference to States was not included, on the understanding that it was not strictly necessary for a provision on the purpose of the draft

articles. The obligations of States are considered in draft articles 11 [16], 12 [9], 13 [10],14 [11], 17 [14] and 18.

(5) The phrase "response to disasters" needs to be read in conjunction with the general direction in draft article 1 [1] that the temporal application of the draft articles needs to be viewed, where relevant, to include the pre-disaster risk-reduction, prevention and mitigation phase, as well as with draft articles 10 [5 *ter*] and 11 [16]. While other formulations specifying all the phases of assistance were considered, the Commission opted for the present, more economical, phrasing, without intending to favour a strict interpretation that would render the provision applicable only to the response phase of disaster assistance activities.

(6) The word "facilitate" reflects the vision of the Commission for the role that the draft articles might play in the overall panoply of instruments and arrangements that exist at the international level in the context of disaster relief and assistance. It was felt that while the draft articles could not by themselves ensure a response, they were intended to facilitate an adequate and effective response.

(7) The qualifier "essential" before the term "needs" was included in order to indicate more clearly that the needs being referred to are those related to survival or similarly essential needs in the aftermath of a disaster. It was felt that "essential" clearly brought out the context in which such needs arise. Such reference should be further understood in the context of the importance of taking into account the needs of the particularly vulnerable, as indicated in draft article 7 [6].

(8) By "persons concerned" what is meant are people directly affected by the disaster, as opposed to individuals more indirectly affected. This term was included so as to further qualify the scope of application of the draft articles. This is in conformity with the approach taken by existing instruments, which focus on the provision of relief to persons directly affected by a disaster. This is not to say that individuals who are more indirectly affected, for example, through loss of family members in a disaster or who suffered economic loss owing to a disaster elsewhere, would be without remedy. Instead, it is not the intention of the Commission to cover their situation in the draft articles.

(9) As regards the reference to rights, it was understood that some of the relevant rights are economic and social rights, which States have an obligation to ensure progressively. As such, the present formula of "with full respect for" was accepted as being more neutral, but nonetheless carries an active connotation of the rights being "fully" respected, as confirmed by draft article 6 [8]. In addition, the phrase intentionally leaves the question of how those rights are to be enforced to the relevant rules of international law themselves. It is understood that there is often an implied degree of latitude in the application of rights, conditioned by the extent of the impact of the disaster, depending on the relevant rules recognizing or establishing the rights in question.

(10) The reference to "rights" is not only a reference to human rights, but also, *inter alia*, to rights acquired under domestic law. A suggestion to draw up a list of applicable rights did not meet with approval for the simple reason that it is not possible to consider all potentially applicable rights, and out of concern that such a list could lead to an *a contrario* interpretation that rights not mentioned therein were not applicable. Nonetheless, it is contemplated that the reference would include such applicable rights as the right to life, as

recognized in article 6, paragraph 1, of the International Covenant on Civil and Political Rights.[245]

### Article 3 [3]
### Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

### Commentary

(1) Draft article 3 [3] seeks to define the term "disaster" for the purpose of the draft articles. It was considered necessary to delimit the definition so as to properly capture the scope of application of the draft articles, as established in draft article 1 [1], while not, for example, inadvertently also dealing with other serious events, such as political and economic crises, which may also undermine the functioning of society. Such delimitation of the definition is evident from two features of the definition: (1) the emphasis placed on the existence of an event which caused the disruption of society; and (2) the inclusion of a number of qualifying phrases.

(2) The Commission considered the approach of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998, which conceptualized a disaster as being the consequence of an event, namely the serious disruption of the functioning of society caused by that event, as opposed to being the event itself. The Commission was aware that such an approach represented contemporary thinking in the humanitarian assistance community, as confirmed by the 2005 World Conference on Disaster Reduction, convened by the United Nations at Hyogo in Japan, as well as by recent treaties and other instruments, including the 2007 IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.[246] Nonetheless, the prevailing view was that the Commission was free to shift the emphasis back to the earlier conception of "disaster" as being a specific event, since it was embarking on the formulation of a legal instrument, which required a more concise and precise legal definition, as opposed to one that is more policy-oriented.

(3) The element of the existence of an event is qualified in several ways. First, the reference to a "calamitous" event serves to establish a threshold, by reference to the nature of the event, whereby only extreme events are covered. This was inspired by the definition embodied in the Resolution on Humanitarian Assistance adopted by the Institute of International Law at its 2003 Bruges session,[247] which deliberately established such higher threshold so as to exclude other acute crises. What constitutes "calamitous" is to be understood both by application of the qualifier in the remainder of the provision, viz. "... resulting in widespread loss of life, great human suffering and distress or large-scale material or environmental damage, thereby seriously disrupting the functioning of society"; and by keeping in mind the scope and purpose of the draft articles, as articulated in draft articles 1 [1] and 2 [2]. In addition, reference is made to "event or series of events" in order

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[245] United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171 and vol. 1057, p. 407. See too: Inter-Agency Standing Committee (IASC) Operational Guidelines on Human Rights and Natural Disasters, 2006. See also paras. (2) and (3) of the commentary to draft art. 6 [8].

[246] International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance ("IFRC Guidelines"), 2007.

[247] Resolution on Humanitarian Assistance, adopted by the Institute of International Law, 2 September 2003, Bruges, Belgium ("Resolution on Humanitarian Assistance").

to cover those types of events which, on their own, might not meet the necessary threshold, but which, taken together, would constitute a calamitous event for purposes of the draft articles. No limitation is included concerning the origin of the event, i.e. whether natural or man-made, in recognition of the fact that disasters often arise from complex sets of causes that may include both wholly natural elements and contributions from human activities.

(4) The event is further qualified by two causation requirements. First, for the event, or series of events, to be considered "calamitous" in the sense required by the draft articles, it has to result in one or more of three possible outcomes: widespread loss of life, great human suffering and distress, or large-scale material or environmental damage. Accordingly, a major event such as a serious earthquake, which takes place in the middle of the ocean or in an uninhabited area, and which does not result in at least one of the three envisaged outcomes, would not satisfy the threshold requirement in draft article 3 [3]. In addition, the nature of the event is further qualified by the requirement that any, or all, of the three possible outcomes, as applicable, result in the serious disruption of the functioning of society. In other words, an event which resulted in, for example, the widespread loss of life, but does not seriously disrupt the functioning of society, would not, accordingly, satisfy the threshold requirement. Hence, by including such causal elements, the definition retains aspects of the approach taken in contemporary texts, as exemplified by the Tampere Convention, namely by considering the consequence of the event as a key aspect of the definition, albeit for purposes of establishing the threshold for the application of the draft articles.

(5) The element of "widespread loss of life" is a refinement, inspired by the 1995 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief. The requirement of "widespread" loss of life serves to exclude events which result in relatively low loss of life; it being borne in mind that such events could nonetheless satisfy one of the other causal requirements. Conversely, an event causing widespread loss of life could, on its own, satisfy the causation requirement and could result in the triggering of the application of the draft articles if it resulted in the serious disruption of the functioning of society.

(6) The possibility of "great human suffering and distress" was included out of recognition that many major disasters are accompanied by widespread loss of life or by great human suffering and distress. Accordingly, cases where an event has resulted in relatively localized loss of life, owing to adequate prevention and preparation, as well as effective mitigation actions, but nonetheless has caused severe dislocation resulting in great human suffering and distress which seriously disrupt the functioning of society, would be covered by the draft articles.

(7) "Large-scale material or environmental damage" was included by the Commission in recognition of the wide-scale damage to property and the environment typically caused by major disasters, and the resultant disruption of the functioning of society arising from the severe setback for human development and well-being that such a loss typically causes. It is to be understood that it is not the environmental or property loss *per se* that would be covered by the draft articles, but rather the impact on persons of such loss; thus avoiding a consideration of economic loss in general. A requirement of economic loss might unnecessarily limit the scope of the draft articles, by, for example, precluding them from also dealing with activities designed to mitigate potential future human loss arising from existing environmental damage.

(8) As already alluded to, the requirement of serious disruption of the functioning of society serves to establish a high threshold which would exclude from the scope of application of the draft articles other types of crises such as serious political or economic crises. Such differences in application is further borne out by the purpose of the draft articles, as established in draft article 2 [2], and by the fact that the type of protection

required, and rights involved, in those other types of crises may be different, and are, to varying extents, regulated by other rules of international law, as anticipated in draft article 20.

(9) While the three possible outcomes envisaged provide some guidance on what might amount to a serious disruption of the functioning of society, the Commission refrained from providing further descriptive or qualifying elements, so as to leave some discretion in practice.

### Article 4
### Use of terms

For the purposes of the present draft articles:

(a) "affected State" means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

(b) "assisting State" means a State providing assistance to an affected State at its request or with its consent;

(c) "other assisting actor" means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

(d) "external assistance" means relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction;

(e) "relief personnel" means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction;

(f) "equipment and goods" means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects for disaster relief assistance or disaster risk reduction.

### Commentary

(1) The Commission's practice, as reflected in most of the draft articles adopted on diverse topics of international law, has been to include a provision on the "use of terms". Some of the terms selected for inclusion in draft article 4 were specifically singled out in the commentaries to various draft articles as requiring definition. Other terms were included because of their overall frequency of occurrence in the draft articles.

*Subparagraph (a)*

(2) Subparagraph (a), which defines the term "affected State" for purposes of the draft articles is inspired by the definition of the same term provided in the IFRC Guidelines.[248] It reflects the basic orientation that the draft articles are primarily addressed to States. It also anticipates the centrality of the role to be played by the State affected by the disaster, as established in draft article 12 [9].

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[248] *Supra*, note 246, art. 2 (8) ("[t]he State upon whose territory persons or property are affected by a disaster").

(3) The key feature in disaster response or disaster risk reduction is State control. In most cases that would accord with control exercised by the State upon whose territory the disaster occurs. Accordingly, the scenario in draft article 12 [9], paragraph 1, in which an affected State "by virtue of its sovereignty" has the duty to ensure protection, is covered by the reference to "territory" in subparagraph (a). However, this does not necessarily exclude other scenarios, where a State may exercise *de jure* jurisdiction, or *de facto* control, over another territory on which a disaster occurs. The Commission considered that a State exercising jurisdiction or control over a territory (other than its own) or area on which a disaster occurs, would also be considered an "affected State" for purposes of the draft articles. Such possibility is also implicit in the recognition, in draft article 21 [4], that the draft articles would apply in the context of so-called "complex disasters", which occur on the same territory where an armed conflict is taking place. The phrase "in the territory or otherwise under the jurisdiction or control of which" was drawn from the definition of "State of origin" in article 2, subparagraph (d), of the 2001 articles on prevention of transboundary harm from hazardous activities.[249]

(4) The Commission recognized that the implication of including States exercising jurisdiction or control was that, in exceptional cases, there may be two affected States: the State upon whose territory the disaster occurs, and the State exercising jurisdiction or control over that territory regarding the same territory. At the present stage, the Commission was of the view that draft article 14 [11] (requirement of the consent of the affected State), did not, in the absence of any special agreement between the two States, provide a definitive solution as to which affected State's consent would be required.

(5) The definition further seeks to reflect the focus of the draft articles, namely the effect on persons as opposed to, for example, simply asserting that it is the State upon whose territory a disaster takes place. The reference to property has been retained as a further element common to many disasters, and implied in the reference to "large-scale material … damage" in the definition of disaster in draft article 3 [3]; it being understood that the draft articles apply only to the impact of economic loss on persons.[250] The provision was also aligned with draft article 3 [3], so as not only to cover persons and property affected by a disaster but also damage to the environment.

(6) The formulation of the phrase "affected by a disaster" reflects the contemporary view that the focus of attention is on the effects of a disaster on persons and property, as opposed to the disaster itself. It also accords with the Commission's approach of considering the consequence of the event as a key element for purposes of establishing the threshold for the application of the draft articles.[251]

### *Subparagraph (b)*

(7) The definition of "assisting State" in subparagraph (b) is drawn from the definition of "supporting State" in the Framework Convention on Civil Defence Assistance of 2000,[252] with the term "Beneficiary State" changed to "affected State", which is the term utilized in the draft articles and defined in subparagraph (a). The phrase "a State providing assistance" is a reference to the concept of "external assistance", which is defined in subparagraph (d), and which is undertaken on the basis of the duty to cooperate in draft article 8 [5], read together with draft articles 9 [5 *bis*] and 10 [5 *ter*].

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[249] General Assembly resolution 62/68 of 6 December 2007, annex, art. 2.

[250] See below para. (7) of the commentary to draft art. 3 [3].

[251] *Ibid.*, para. (4).

[252] United Nations, *Treaty Series*, vol. 2172, No. 38131, p. 213, art. 1 (f) ("Framework Convention on Civil Defence Assistance").

(8) A State is only categorized as an "assisting State" once the assistance is being or has been provided. In other words, a State offering assistance is not an "assisting State", with the various legal consequences that flow from such categorization, as provided for in the draft articles, until such assistance has been consented to by the affected State, in accordance with draft article 14 [11].

(9) The phrase "at its request or with its consent" reflects the interplay between draft articles 13 [10], 14 [11] and 16 [12]. In particular, it reflects the basic stance taken in the draft articles that it is the duty of the affected State to seek external assistance when its national response capacity has been overwhelmed by a disaster (draft article 13 [10]). At the same time, it envisages the possibility of the affected State receiving unsolicited offers of external assistance, as provided for under draft article 16 [12], the provision of which is subject to its consent under draft article 14 [11].

*Subparagraph (c)*

(10) In addition to affected and assisting States, the draft articles also seek to regulate the position of other assisting actors. A significant proportion of contemporary disaster risk reduction and disaster relief activities are undertaken by, or under the auspices of, international organizations, including but not limited to the United Nations, as well as non-governmental organizations and other entities and even individuals. This group of actors is collectively referred to in the draft articles as "other assisting actors". This is without prejudice to their differing legal status under international law, which is acknowledged in the draft articles, for example, in draft article 16 [12].[253]

(11) The provision reflects, in part, the commentary to draft article 19 [15], which confirms the understanding that the term "assisting actors" refers primarily to, in the formulation employed in draft article 8 [5], "competent intergovernmental organizations" and "relevant non-governmental organizations".[254] The phrase "or any other entity or individual", which is drawn from the ASEAN Agreement,[255] was added in recognition of the fact that not all actors which are involved in disaster relief efforts can be categorized in one or the other category mentioned. In particular, that phrase is to be understood as a term of art referring to the International Committee of the Red Cross (ICRC) and the International Federation of the Red Cross and Red Crescent Societies (IFRC).

(12) The phrase "external to the affected State" reflects the position, also mentioned in the commentary to draft article 15 [13], that the draft articles regulate the activities of actors which are external to the affected State.[256] Accordingly, the activities of domestic non-governmental organizations, for example, are not covered. Nor would a domestic actor incidentally fall within the scope of application of the draft articles through the act of securing, or attempting to secure, assistance from abroad.

(13) As with the definition of "assisting State", in subparagraph (b), the concluding phrase "providing assistance to that State at its request or with its consent" is a reference to the interplay between draft articles 13 [10], 14 [11] and 16 [12]. It is also included in recognition of the broad range of activities typically undertaken by the entities in question, in the context of both disaster risk reduction and the provision of disaster relief assistance, and which are regulated by the draft articles.

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[253] See below para. (4) of the commentary to draft art. 16 [12].

[254] See below para. (4) of the commentary to draft art. 19 [15].

[255] ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005 ("ASEAN Agreement"), ASEAN Documents Series 2005, p. 157, art. 1 (1) (definition of "assisting entity").

[256] See below para. (2) of the commentary to draft art. 15 [13].

*Subparagraph (d)*

(14) Subparagraph (d) seeks to define the type of assistance which the draft articles envisage assisting States or other assisting actors providing to the affected State, as a form of cooperation anticipated in draft articles 9 [5 *bis*] and 10 [5 *ter*].

(15) The formulation, which draws inspiration from the commentary to draft article 15 [13],[257] is based on both the Oslo Guidelines and the Framework Convention on Civil Defence Assistance of 2000.[258] The reference to "material" in the Oslo Guidelines was replaced with "equipment and goods", which is the term used in the draft articles, and which is defined in subparagraph (f).

(16) The phrase "provided to an affected State by assisting States or other assisting actors" reiterates the nature of the legal relationship between the assisting State or actor and the affected State, as envisaged in the draft articles.

(17) The concluding clause seeks to clarify the purpose for which external assistance ought to be provided, namely "for disaster relief assistance or disaster risk reduction". While the formulation is cast in the technical terminology of disaster response and disaster risk reduction, it is understood to accord with the overall purpose of the draft articles, set out in draft article 2 [2], namely to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights".

*Subparagraph (e)*

(18) The subparagraph seeks to define the personnel component of external assistance provided by assisting States or by other assisting actors. The formulation employed is inspired by that adopted by the Commission in the commentary to draft article 9 [5 *bis*].[259] The definition indicates the two types of personnel who are typically sent for the purpose of providing disaster relief assistance or disaster risk reduction, as alluded to in draft article 17 [14], subparagraph 1(a), namely "civilian" or "military" personnel. The reference to the latter category was also inspired by the bilateral treaty between Greece and the Russian Federation of 2000,[260] and is intended as a recognition of the important role played by military personnel, as a category of relief personnel, in the provision of disaster relief assistance.[261] While the reference to military personnel is more pertinent to the case of assisting States, the term "civilian" personnel is meant to be broad enough to cover such personnel sent by assisting States and other assisting actors. That these are options open to some, but not all, assisting entities (including States) is confirmed by the use of the phrase in the alternative ("or").

(19) While the phrase "civilian or military personnel" was selected to accord with the formulation used in draft article 17 [14], it is understood that such personnel are typically "specialized" personnel, as referred to in the annex to General Assembly resolution 46/182, in that what is expected are personnel which enjoy the necessary skill set and are provided with the necessary equipment and goods, as defined in subparagraph (f), to perform the functions in question.

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[257] *Ibid.*

[258] See art. 1 (d) (definition of "assistance").

[259] See para. (7) of the commentary to draft art. 9 [5 *bis*].

[260] Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on Cooperation in the Field of Prevention and Response to Natural and Man-Made Disasters, of 21 February 2000, art. 1 (definition of "team for providing assistance").

[261] See para. (4) of the commentary to draft art. 17 [14].

(20) The phrase "sent by" establishes a nexus between the assisting entity, whether a State or other actor, and the personnel in question. The Commission decided against making a reference to "acting on behalf of" so as to avoid the applicability of the rules of international law on the attribution of conduct to States or international organizations,[262] since the personnel sent by an assisting State or actor would be subject to the overall direction and control of the affected State, in accordance with draft article 12 [9].

(21) The traditional application of the concept of "relief personnel" has been in the context of the response to the onset of a disaster. This continues to be reflected in the formulation "for the purpose of providing disaster relief assistance", which mirrors the type of external assistance envisaged in draft article 17 [14], for which the facilitation of "prompt and effective" provision is called for. Nonetheless, as in the case of the definition of "external assistance", in subparagraph (d), the concluding clause has been aligned with the overall purpose of the draft articles, as established in draft article 2 [2], so as also to anticipate relief personnel being involved in disaster risk reduction, as envisaged in draft article 10 [5 *ter*].

*Subparagraph (f)*

(22) As indicated under subparagraph (d), "equipment" and "goods" are a key component of the kind of external assistance being envisaged in the draft articles. The formulation is drawn from the commentary to draft article 17 [14],[263] as well as the resolution on Humanitarian Assistance of the Institute of International Law. The list covers the types of material generally accepted to be necessary for the provision of disaster relief assistance. That the list is not exhaustive is confirmed by the reference to "other objects".

(23) Generally speaking, two types of material are envisaged: the technical "equipment" required by the disaster relief personnel to perform their functions, both in terms of their own sustenance and in terms of what they require to provide relief, such as supplies, tools and machines; and "goods" which are necessary for the survival and the fulfilment of the essential needs of the victims of disasters, such as foodstuffs, drinking water, medical supplies, means of shelter, clothing and bedding. Search dogs are specifically anticipated in the phrase "specially trained animals", which is drawn from Specific Annex J of the Kyoto Convention.[264] The Commission considered the definition to be sufficiently flexible also to include services which might be provided by relief personnel.

### Article 5 [7]
### Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

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[262] See Articles on the responsibility of States for internationally wrongful acts, 2001, General Assembly resolution. 56/83 of 12 December 2001, annex, arts. 4–9, and Articles on the responsibility of international organizations, 2011, General Assembly resolution 66/98 of 9 December 2011, annex, arts. 6–7.

[263] See para. (5) of the commentary to draft art. 17 [14].

[264] International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention") of 18 May 1973, United Nations, *Treaty Series*, vol. 950, No. 13561, p. 269, as revised by the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures of 26 June 1999, United Nations, *Treaty Series*, vol. 2370, No. 13561, p. 27 (definition of "relief consignments").

**Commentary**

(1) Draft article 5 [7] addresses the principle of human dignity in the context of disaster response. The Commission recognizes human dignity as the core principle that informs and underpins international human rights law. In the context of the protection of persons in the event of disasters, human dignity is situated as a guiding principle both for any action to be taken in the context of the provision of relief, and in the ongoing evolution of laws addressing disaster response.

(2) The principle of human dignity undergirds international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law. Reaffirmation of "the dignity and worth of the human person" is found in the preamble to the Charter of the United Nations, while the preamble to the 1948 Universal Declaration of Human Rights declares "recognition of the inherent dignity […] of all members of the human family is the foundation of freedom, justice and peace in the world". Affirmation of the principle of human dignity can be found in the International Covenant on Civil and Political Rights,[265] the International Covenant on Economic, Social and Cultural Rights,[266] the International Convention on the Elimination of all Forms of Racial Discrimination,[267] the Convention on the Elimination of All Forms of Discrimination Against Women,[268] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[269] and the Convention on the Rights of the Child.[270] The principle is also central to the field of international humanitarian law. The concept of personal dignity is recognized in common article 3, paragraph 1 (c) of the 1949 Geneva Conventions,[271] articles 75 and 85 of Protocol I,[272] and article 4 of Protocol II.[273]

(3) The concept of human dignity also lies at the core of numerous instruments at the international level directed towards the provision of humanitarian relief in the event of disasters. The IFRC Guidelines state that "[a]ssisting actors and their personnel should […]

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[265] Preambular paragraphs; art. 10, para. 1.

[266] United Nations, *Treaty Series*, vol. 993 , No. 14568, p. 3, preambular paragraphs; art. 13, para. 1.

[267] *Ibid.*, vol. 660, No. 9464, p. 195, preambular paragraphs.

[268] *Ibid.*, vol. 1249, No. 20378, p. 13, preambular paragraphs.

[269] *Ibid.*, vol. 1465, Nol 24841, p. 85, preambular paragraphs.

[270] *Ibid.*, vol. 1577, No.27531, p. 3, preambular paragraphs; arts. 23, para. 1; 28, para. 2; 37; 39 and 40.

[271] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, United Nations, *Treaty Series*, vol. 75, No. 970, p. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, United Nations, *Treaty Series*, vol. 75, No. 971, p. 85; Geneva Convention relative to the Treatment of Prisoners of War, United Nations, *Treaty Series*, vol. 75, No. 972, p. 135; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, United Nations, *Treaty Series*, vol. 75, No. 973, p. 287 ("1949 Geneva Conventions"), common art. 3, para. 1 (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment").

[272] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, art. 75, para. 2 (b), (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault"); art. 85, para. 4 (c) (noting that when committed wilfully and in violation of the Conventions or the Protocol, "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" are regarded as grave breaches of the Protocol).

[273] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 609, art. 4, para. 2 (e) (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault").

respect the human dignity of disaster-affected persons at all times".[274] General Assembly resolution 45/100 holds that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".[275] The Institute of International Law likewise reflects that a failure to provide humanitarian assistance to those affected by disasters constitutes "an offence to human dignity".[276]

(4) The opening phrase of draft article 5 [7], "[i]n responding to disasters", reflects the substantive context in which the provision applies. While it is anticipated that the phrase is primarily directed towards the response and recovery phase, the reference should be read in light of paragraph (5) of the commentary to draft article 2 [2]. The Commission chose the term "responding to" over the more generic "in their response", so as to give a sense of the continuing nature of the obligation to respect and protect the human dignity of affected persons throughout the duration of the response period. The precise formulation of the principle adopted by the Commission, namely the "inherent dignity of the human person", is drawn from the preamble of the International Covenant on Economic, Social and Cultural Rights, and article 10, paragraph 1, of the International Covenant on Civil and Political Rights. This formulation has also been adopted in instruments such as the Convention on the Rights of the Child,[277] and the American Convention on Human Rights.[278]

(5) The phrase "States, competent intergovernmental organizations and relevant non-governmental organizations" provides an indication of the actors to which the provision is addressed. In its reference to "States", the Commission recognizes the role played both by affected States and assisting States in disaster response activities (see draft articles 12 [9] to 18). As a whole, the phrase recognizes that much of the activity in the field of disaster response occurs through organs of intergovernmental organizations, non-governmental organizations, and other non-State entities such as the IFRC.[279] The Commission determined that the current formulation maintained consistency with draft article 8 [5], as opposed to a more general reference to "other relevant actors".

(6) The Commission adopted the phrase "respect and protect" as a formula that accords with contemporary doctrine and jurisprudence in international human rights law. The formula is used in a number of instruments that relate to disaster relief, including the Oslo Guidelines,[280] the Mohonk Criteria,[281] the Guiding Principles on Internal Displacement,[282]

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[274] IFRC Guidelines, art. 4, para. 1.

[275] General Assembly resolution 45/100 of 14 December 1990, preambular paragraph.

[276] Resolution on humanitarian assistance, art. II, para. 1.

[277] Convention on the Rights of the Child, art. 37 (c) (noting *inter alia* that "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person").

[278] American Convention on Human Rights, Organization of American States, *Treaty Series*, No. 36, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, art. 5, para. 2 (noting *inter alia* that "[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person").

[279] See *Official Records of the General Assembly, Sixty-first session, Supplement No. 10* (A/61/10), Annex C, para. 28.

[280] Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines"), revised on 1 November 2007, para. 20 (noting that "[t]he dignity and rights of all victims must be respected and protected").

[281] J.M. Ebersole, "The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies" ("Mohonk Criteria"), *Human Rights Quarterly*, vol. 17, No. 1 (February 1995), p. 196 ("noting that "[t]he dignity and rights of all victims must be respected and protected").

[282] E/CN.4/1998/53/Add.2, annex, principle 26 (noting *inter alia* that "[p]ersons engaged in humanitarian assistance, their transport and supplies shall be respected and protected").

and the Guiding Principles on the Right to Humanitarian Assistance.[283] In conjunction, the terms "respect and protect" connote a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to protect human dignity. By way of example, the duty to protect requires States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity. The Commission considered that an obligation to "protect" should be commensurate with the legal obligations borne by the respective actors addressed in the provision. An affected State therefore holds the primary role in the protection of human dignity, by virtue of its primary role in the direction, control, coordination and supervision of disaster relief and assistance, as reflected in draft article 12 [9], paragraph 2.

### Article 6 [8]
### Human rights

Persons affected by disasters are entitled to respect for their human rights.

**Commentary**

(1) Draft article 6 [8] seeks to reflect the broad entitlement to human rights protection held by those persons affected by disasters. The Commission recognizes an intimate connection between human rights and the principle of human dignity reflected in draft article 5 [7], reinforced by the close proximity of the two draft articles.

(2) The general reference to "human rights" encompasses human rights obligations expressed in relevant international agreements and reflected in customary international law, as well as assertions of best practices for the protection of human rights included in non-binding texts on the international level. The Commission decided not to limit the provision to obligations "set out in the relevant international agreements". The formulation adopted by the Commission indicates the broad field of human rights obligations, without seeking to specify, add to, or qualify those obligations.

(3) The Commission considered that the reference to "human rights" incorporates both the substantive rights and limitations that exist in the sphere of international human rights law. In particular, the provision contemplates an affected State's right of derogation where recognized under existing international human rights law.

(4) As clarified in the commentary to draft article 1 [1], at paragraph (3), the scope *ratione personae* of the draft articles includes the activities of States and international organizations and other entities enjoying specific international legal competence in the provision of disaster relief and assistance. The Commission recognizes that the scope and content of an obligation to protect the human rights of those persons affected by disasters will vary considerably between these actors. The neutral phrasing adopted by the Commission should be read in light of an understanding that distinct obligations will be held by affected States, assisting States, and various other assisting actors, respectively.

(5) The reference at the beginning of draft article 6 [8] to "persons affected by disasters" reaffirms the context in which the draft articles apply, and is not to be understood as implying that persons not affected by a disaster do not similarly enjoy such rights.

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[283] Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the International Institute of Humanitarian Law in April 1993, principle 10 (noting that "[h]umanitarian assistance can, if appropriate, be made available by way of 'humanitarian corridors' which should be respected and protected by competent authorities of the parties involved and if necessary by the United Nations authority").

### Article 7 [6]
### Humanitarian principles

**Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.**

### Commentary

(1) Draft article 7 [6] establishes the key humanitarian principles relevant to disaster response. The title of the draft article serves to indicate that the principles indicated therein are considered by the Commission to constitute humanitarian principles that underlie disaster relief and assistance. On this basis the Commission did not find it necessary to determine whether these principles are also general principles of international law, and noted that the principles do not apply to the exclusion of other relevant principles of international law. The Commission opted to enshrine the principles in the form of a draft article in recognition of their significance to the provision of disaster relief and assistance.

(2) The principles of humanity, neutrality and impartiality are core principles recognized as foundational to humanitarian assistance.[284] The principles are likewise fundamental to applicable laws in disaster relief efforts. By way of example, General Assembly resolution 46/182 notes that "[h]umanitarian assistance must be provided in accordance with the principles of humanity, neutrality, and impartiality".[285]

(3) The principle of humanity stands as the cornerstone of the protection of persons in international law. Situated as an element both of international humanitarian law and international human rights law, it informs the development of laws regarding the protection of persons in the event of disasters. Within the field of international humanitarian law, the principle is most clearly expressed in the requirement of humane treatment in common article 3 of the 1949 Geneva Conventions.[286] However, as the International Court of Justice affirmed in the *Corfu Channel* case (merits), elementary considerations of humanity are also general and well-recognized principles of the international legal order, "even more exacting in peace than in war".[287] Pictet's commentary on the principles of the Red Cross attributes three elements to the principle of humanity: to prevent and alleviate suffering, to protect life and health, and to assure respect for the individual".[288] In the specific context of disaster relief, the Oslo Guidelines and the Mohonk Criteria affirm that the principle of humanity requires that "human suffering must be addressed wherever it is found".[289]

(4) While the principle of neutrality is rooted in the context of an armed conflict, the Commission determined that the principle is nonetheless applicable in other branches of the

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[284] See discussion in the Secretariat Memorandum, A/CN.4/590, para. 11.

[285] General Assembly resolution 46/182 of 19 December 1991, annex, para. 2.

[286] See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 3, para. 1 (noting that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria").

[287] *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), I.C.J. Reports 1949*, p. 4 at p. 22.

[288] Jean Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary* (Geneva, Henry Dunant Institute, 1979), pp. 21–27; also available from www.icrc.org.

[289] Oslo Guidelines, para. 20; Mohonk Criteria, p. 196.

law. In the context of humanitarian assistance, the principle of neutrality has acquired a more specific meaning that is reflected in draft article 7 [6]. In this setting, the principle requires that the provision of assistance be independent of any given political, religious, ethnic, or ideological context. The Oslo Guidelines and the Mohonk Criteria both affirm that the assistance should be provided "without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature".[290] As such, the principle of neutrality indicates the apolitical nature of disaster response, and affirms that humanitarian activities may not be used for purposes other than responding to the disaster at hand. The principle ensures that the interest of those persons affected by disasters are the primary concern of the affected State and any other relevant actors in disaster response. Respect for the principle of neutrality is central to facilitating the achievement of an adequate and effective response to disasters, as outlined in draft article 2 [2]. Neutrality therefore can be considered an operational mechanism to implement the ideal of humanity.

(5) The principle of impartiality encompasses three principles: non-discrimination, proportionality, and impartiality proper. For reasons discussed below, the principle of non-discrimination is articulated by the Commission not merely as an element of draft article 7 [6], but also as an autonomous principle of disaster response. Non-discrimination is directed towards the removal of objective grounds for discrimination between individuals, such that the provision of assistance to affected persons is guided solely by their needs. The principle of proportionality stipulates that the response to a disaster be proportionate to the scope of that disaster and the needs of affected persons. The principle also acts as a distributive mechanism, enabling the provision of assistance to be delivered with attention given to the most urgent needs. Impartiality proper reflects the principle that no subjective distinctions be drawn between individuals in the response to disasters. The Commentary to the First Protocol Additional to the Geneva Conventions thus conceptualizes impartiality as "a moral quality which must be present in the individual or institution called upon to act for the benefit of those who are suffering".[291] By way of example, the Draft International Guidelines for Humanitarian Assistance Operations provide that "[h]umanitarian assistance should be provided on an impartial basis without any adverse distinction to all persons in urgent need".[292] As a whole, the principle of impartiality requires that responses to disasters be directed towards full respect and fulfilment of the needs of those affected by disasters in a manner that gives priority to the needs of the particularly vulnerable.

(6) The principle of non-discrimination reflects the inherent equality of all persons and the determination that no adverse distinction may be drawn between them. Prohibited grounds for discrimination are non-exhaustive, and include ethnic origin, sex, nationality, political opinions, race, and religion.[293] The Commission determined that non-discrimination should be referred to as an autonomous principle in light of its importance to the topic at hand. Such an approach has also been taken by the Institute of International

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[290] *Ibid.*

[291] See Claude Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), paragraph 2800–2801 (citing the "Proclamation of the Fundamental Principles of the Red Cross", adopted by resolution IX of the 20th International Conference of the Red Cross, Vienna 1965), and Pictet, *Commentary*, pp. 33–51.

[292] Peter MacAlister-Smith, *Draft international guidelines for humanitarian assistance operations* (Heidelberg, Germany: Max Planck Institute for Comparative Public Law and International Law, 1991), para. 6 (a).

[293] See *inter alia* the 1949 Geneva Conventions, common art. 3, para. 1; Universal Declaration of Human Rights, General Assembly resolution 217 (III) of 10 December 1948, art. 2; International Covenant on Civil and Political Rights, art. 2, para. 1; International Covenant on Economic, Social and Cultural Rights, art. 2, para. 2.

Law in its 2003 resolution on humanitarian assistance, which stipulates that the offer and distribution of humanitarian assistance shall occur "without any discrimination on prohibited grounds".[294] The IFRC Guidelines likewise specify that assistance be provided to disaster-affected persons without "any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age, and political opinions)".[295]

(7) The Commission noted that the principle of non-discrimination is not to be taken as excluding the prospect of "positive discrimination" as appropriate. The phrase "while taking into account the needs of the particularly vulnerable" in draft article 7 [6] reflects this position. The Commission considered the term "vulnerable" to encompass both groups and individuals. For this reason, the neutral expression "vulnerable" was preferred to either to "vulnerable groups" or to "vulnerable persons". The qualifier "particularly" was adopted by the Commission in recognition of the fact that those affected by disaster are by definition vulnerable. The specific phrasing of "particularly vulnerable" is drawn from article 4, paragraph 3 (a) of the IFRC Guidelines, which refer to the special needs of "women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses".[296] The qualifier is also mirrored in the Resolution on humanitarian assistance adopted by the Institute of International Law, which refers to the requirement to take into account the needs of the "most vulnerable".[297]

### Article 8 [5]
### Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

### Commentary

(1) Effective international cooperation is indispensable for the protection of persons in the event of disasters. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. The Charter of the United Nations enshrines it, not least with reference to the humanitarian context in which the protection of persons in the event of disasters places itself. Article 1 (3) of the Charter clearly spells out as one of the purposes of the Organization:

> "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Articles 55 and 56 of the Charter elaborate on Article 1 (3) with respect to international cooperation. Article 55 of the Charter reads:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

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[294] Resolution on Humanitarian Assistance, art. II, para. 3.

[295] IFRC Guidelines, 2007, art. 4, para. 2 (b).

[296] *Ibid.*, art. 4, para. 3 (a).

[297] Resolution on humanitarian assistance, art. II, para. 3.

> "a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> "b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> "c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56 of the Charter reads:

> "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The general duty to cooperate was reiterated as one of the principles of international law in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the following terms:

> "States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences."[298]

(2) Cooperation takes on special significance with regard to international human rights law. The International Covenant on Economic, Social and Cultural Rights refers explicitly to international cooperation as a means of realizing the rights contained therein.[299] This has been reiterated by the Committee on Economic, Social and Cultural Rights in its general comments relating to the implementation of specific rights guaranteed by the Covenant.[300] International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities which is, *inter alia*, applicable "in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters".[301]

(3) With regard to cooperation in the context of disaster relief and assistance, the General Assembly recognized, in resolution 46/182, that:

> "[t]he magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws ..."[302]

In addition, there exist a vast number of instruments of specific relevance to the protection of persons in the event of disasters which demonstrate the importance of international cooperation in combating the effects of disasters. Not only are these instruments in themselves expressions of cooperation, they generally reflect the principle of cooperation relating to specific aspects of disaster governance in the text of the instrument. Typically in bilateral agreements, this has been reflected in the title given to the instrument, denoting either cooperation or (mutual) assistance.[303] Moreover, the duty to cooperate, in the vast majority of cases, is framed as one of the objectives of the instrument or is attributed positive effects towards their attainment. Again, the Tampere Convention is of relevance in this respect as it indicates in paragraph 21 of its preamble that the parties wish "to facilitate international cooperation to mitigate the impact of disaster". Another example can be found in an agreement between France and Malaysia:

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[298] General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

[299] General Assembly resolution 2200 A (XXI) of 16 December 1966, annex, arts. 11, 15, 22 and 23.

[300] See, in particular, general comments No. 2 (E/1990/23), No. 3 (E/1991/23), No. 7 (E/1998/22), No. 14 (E/C.12/2000/4) and No. 15 (E/C.12/2002/11).

[301] General Assembly resolution 61/106 of 13 December 2006, annex I, art. 11.

[302] Annex, para. 5.

> "Convinced of the need to develop cooperation between the competent organs of both Parties in the field of the prevention of grave risks and the protection of populations, property and the environment ..."[304]

(4) Cooperation, however, should not be interpreted as diminishing the primary role of a sovereign State within the limits of international law, as provided for in draft article 12 [9], paragraph 2. Furthermore, the principle of cooperation is to be understood also as being complementary to the duty of the authorities of the affected State to take care of the persons affected by natural disasters and similar emergencies occurring on its territory (draft article 12 [9], paragraph 1).[305]

(5) A key feature of activity in the field of disaster relief assistance is international cooperation not only among States, but also with international and non-governmental organizations. The importance of their role has been recognized for some time. In resolution 46/182 of 19 December 1991, the General Assembly confirmed that:

> "... [i]ntergovernmental and non-governmental organizations working impartially and with strictly humanitarian motives should continue to make a significant contribution in supplementing national efforts."[306]

In a resolution adopted in 2008, the Economic and Social Council recognized:

> "... the benefits of engagement of and coordination with relevant humanitarian actors to the effectiveness of humanitarian response, and encourage[d] the United Nations to continue to pursue efforts to strengthen partnerships at the global level with the International Red Cross and Red Crescent Movement, relevant humanitarian non-governmental organizations and other participants of the Inter-Agency Standing Committee."[307]

(6) Draft article 8 [5] recognizes the central importance of international cooperation to international disaster relief and assistance activities. It establishes a legal obligation for the various parties concerned. It was understood, however, that the nature of the obligation of cooperation may vary, depending on the actor and the context in which assistance is being sought and offered. By its nature, cooperation is reciprocal, so that a duty for a State to cooperate with an international organization, for example, implies the same duty on the part of the organization. It was found that attempting to distinguish cooperation between States,

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[303] See A/CN.4/590/Add.2 for a comprehensive list of relevant instruments. For a further typology of instruments for the purposes of international disaster response law, see H. Fischer, "International disaster response law treaties: trends, patterns, and lacunae" in IFRC, *International disaster response laws, principles and practice: reflections, prospects and challenges* (2003), at pp. 24–44.

[304] Agreement between the Government of the French Republic and the Government of Malaysia on Cooperation in the Field of Disaster Prevention and Management and Civil Security, 25 May 1998, preambular paragraph 4.

[305] Resolution 46/182 of 19 December 1991, annex, para. 4. See also Hyogo Declaration, 2005, A/CONF.206/6 and Corr.1, chap. 1, resolution 1, para. 4.

[306] Annex, para. 5.

[307] Resolution 2008/36 of 25 July 2008, para. 7.

and between States and international organizations (particularly the United Nations), the International Federation of the Red Cross and Red Crescent Societies, and with "relevant non-governmental organizations", did not adequately capture the range of possible legal relationships between States and the various entities mentioned in the provision. The nature of the legal obligation to cooperate is dealt with in specific provisions (hence the opening phrase "[i]n accordance with the present draft articles"), particularly draft articles 9 [5 *bis*] and 10 [5 *ter*]. The Commission inserted the phrase "as appropriate", which qualifies the entire draft article, both as a reference to existing specific rules on cooperation between the various entities mentioned in the draft article which establish the nature of the obligation to cooperate, and as an indication of a degree of latitude in determining, on the ground, when cooperation is or is not "appropriate".

(7) The qualifier "competent" before "intergovernmental organizations" was included as an indication that, for purposes of the draft articles, cooperation would only be necessary with those entities that are involved in the provision of disaster relief and assistance. A reference to the International Committee of the Red Cross is included as a consequence of the fact that the draft articles may also apply in complex emergencies involving armed conflict.[308]

### Article 9 [5 *bis*]
### Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

### Commentary

(1) Draft article 9 [5 *bis*] seeks to clarify the various forms which cooperation between affected States, assisting States, and other assisting actors may take in the context of the protection of persons in the event of disasters. Cooperation is enshrined in general terms in draft article 8 [5] as a guiding principle and fundamental duty with regard to the present topic, as it plays a central role in disaster relief efforts. The essential role of cooperation lends itself to a more detailed enunciation of the kinds of cooperation relevant in this context. The present draft article is therefore designed to elaborate further on the meaning of draft article 8 [5], without creating any additional legal obligations.

(2) The list of forms of cooperation in draft article 9 [5 *bis*] — humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and goods, and scientific, medical and technical resources — is loosely based on the second sentence of paragraph 4 of article 17 of the articles on the law of transboundary aquifers, which explains the general obligation to cooperate in article 7 of those draft articles by describing the cooperation necessary in emergency situations.[309] The second sentence of paragraph 4 of article 17 reads:

> "Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance."[310]

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[308] See below para. (2) of the commentary to art. 21.

[309] General Assembly resolution 63/124 of 11 December 2008, annex.

[310] *Ibid.*

As this provision had been specifically drafted with reference to a related context — namely, the need for cooperation in the event of an emergency affecting a transboundary aquifer — the Commission felt that its language was a useful starting point for the drafting of draft article 9 [5 *bis*]. However, the text of article 9 [5 *bis*] was tailored to appropriately reflect the context and purpose of the present draft articles, and to ensure that it took into account the major areas of cooperation dealt with in international instruments addressing disaster response. Similar language is contained in the ASEAN Declaration on Mutual Assistance on Natural Disasters, of 26 June 1976, which states that "Member Countries shall, within their respective capabilities, cooperate in the improvement of communication channels among themselves as regards disaster warnings, exchange of experts and trainees, exchange of information and documents, and dissemination of medical supplies, services and relief assistance."[311] In a similar vein, in explaining the areas in which it would be useful for the United Nations to adopt a coordinating role and encourage cooperation, General Assembly resolution 46/182 calls for coordination with regards to "specialized personnel and teams of technical specialists, as well as relief supplies, equipment, and services …".[312]

(3) The beginning of draft article 9 [5 *bis*] states that the forms of cooperation are outlined "[f]or the purposes of the present draft articles." Therefore, draft article 9 [5 *bis*], which is to be read in light of the other draft articles, is oriented towards the purpose of the topic as a whole as stated in draft article 2 [2], namely, "to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights." In the context of the present topic, the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in draft article 9 [5 *bis*], is the protection of persons affected by disasters.

(4) While the draft article highlights specific forms of cooperation, the list is not meant to be exhaustive, but is instead illustrative of the principal areas in which cooperation may be appropriate according to the circumstances. The non-exhaustive nature of the list is emphasized by the use of the word "includes", and its equivalent in the other official languages. The Commission determined that the highlighted forms are the main areas in which cooperation may be warranted, and that the forms are broad enough to encapsulate a wide variety of cooperative activities. Cooperation may, therefore, include the activities mentioned, but is not limited to them; other forms of cooperation not specified in the present draft article are not excluded, such as financial support; technological transfer covering, among others, satellite imagery; training; information-sharing; and joint simulation exercises and planning.

(5) As draft article 9 [5 *bis*] is illustrative of possible forms of cooperation, it is not intended to create additional legal obligations for either affected States or other assisting actors to engage in certain activities. The forms which cooperation may take will necessarily depend upon a range of factors, including, *inter alia*, the nature of the disaster, the needs of the affected persons, and the capacities of the affected State and other assisting actors involved. As with the principle of cooperation itself, the forms of cooperation in draft article 9 [5 *bis*] are meant to be reciprocal in nature, as cooperation is not a unilateral act, but rather one that involves the collaborative behaviour of multiple parties.[313] The draft article is therefore not intended to be a list of activities in which an assisting State may engage, but rather areas in which harmonization of efforts through consultation on the part of both the affected State and other assisting actors may be appropriate.

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[311] ASEAN Documents Series 1976.

[312] Para. 27.

[313] See above commentary to draft article 8 [5], para. (6).

(6) Moreover, cooperation in the areas mentioned must be in conformity with the other draft articles. For example, as with draft article 8 [5], the forms of cooperation touched upon in draft article 9 [5 *bis*] must be consistent with draft article 12 [9], which grants the affected State, "by virtue of its sovereignty", the primary role in disaster relief assistance. Cooperation must also be in accordance with the requirement of consent of the affected State to external assistance (draft article 14 [11]), as well as the recognition that the affected State may place appropriate conditions on the provision of external assistance, particularly with respect to the identified needs of persons affected by a disaster and the quality of the assistance (draft article 15 [13]). Cooperation is also related to draft article 17 [14], which recognizes the role of the affected State in facilitation of prompt and effective assistance to persons affected by a disaster. As such, and since draft article 9 [5 *bis*] does not create any additional legal obligations, the relationship between the affected State, assisting State, and other assisting actors with regards to the abovementioned forms of cooperation will be regulated in accordance with the other provisions of the present draft articles.

(7) Humanitarian assistance is intentionally placed first among the forms of cooperation mentioned in draft article 9 [5 *bis*], as the Commission considers this type of cooperation of paramount importance in the context of disaster relief. The second category — coordination of international relief actions and communications — is intended to be broad enough to cover most cooperative efforts in the disaster relief phase, and may include the logistical coordination, supervision, and facilitation of the activities and movement of disaster response personnel and equipment and the sharing and exchange of information pertaining to the disaster. Though information exchange is often referred to in instruments that emphasize cooperation in the pre-disaster phase as a preventive mode to reduce the risk of disasters,[314] communication and information is also relevant in the disaster response phase to monitor the developing situation and to facilitate the coordination of relief actions amongst the various actors involved. A number of instruments deal with communication and information sharing in the disaster relief context.[315] The mention of "making available relief personnel, relief equipment and goods, and scientific, medical and technical resources" refers to the provision of any and all resources necessary for disaster response operations. The reference to "personnel" may entail the provision of and cooperation between medical teams, search and rescue teams, engineers and technical specialists, translators and interpreters, or other persons engaged in relief activities on behalf of one of the relevant actors – affected State, assisting State, or other assisting actors. The term "resources" covers scientific, technical, and medical expertise and knowledge as well as equipment, tools, medicines, or other objects that would be useful for relief efforts.

(8) Draft article 9 [5 *bis*] presents a list of the possible forms of cooperation in the disaster response, or post-disaster, phase. Cooperation in the pre-disaster phase, including disaster prevention, preparedness, and mitigation is dealt with in draft article 10 [5 *ter*].

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[314] See, e.g., ASEAN Agreement, art. 18, para. 1.

[315] See, e.g., Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, United Nations, *Treaty Series*, vol. 2296, p. 5 ("Tampere Convention"), art. 3 (calling for "the deployment of terrestrial and satellite telecommunication equipment to predict, monitor and provide information concerning natural hazards and disasters," and "the sharing of information about natural hazards, health hazards and disasters among the States Parties and with other States, non-State entities and intergovernmental organizations, and the dissemination of such information to the public, particularly to at-risk communities"); Oslo Guidelines, para. 54. See also discussion in Secretariat Memorandum, A/CN.4/590, paras. 159–72.

### Article 10 [5 *ter*]
### Cooperation for disaster risk reduction

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

**Commentary**

(1) While draft article 9 [5 *bis*] concerns the various forms which cooperation may take in the disaster relief or post-disaster phase of the disaster cycle, draft article 10 [5 *ter*] indicates that the scope of application *ratione temporis* of the duty to cooperate, enshrined in general terms in draft article 8 [5], also covers the pre-disaster phase. Thus, while draft article 9 [5 *bis*] deals with the response to a disaster, draft article 10 [5 *ter*] addresses the reduction of disaster risk.

(2) This provision qualifies the cooperation referred to as being related to the "taking of measures intended to reduce the risk of disasters". This phrase is to be understood in the light of both paragraphs of draft article 11 [16], in particular its paragraph 2 which envisages a series of measures that are specifically aimed at the reduction of disaster risk.

(3) Draft article 10 [5 *ter*] has been adopted without prejudice to its final location in the set of draft articles, including, in particular, its being incorporated at the same time as draft article 9 [5 *bis*] into a newly revised draft article 8 [5]. These are matters that have been left to the second reading of the draft articles.

### Article 11 [16]
### Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

**Commentary**

(1) Draft article 11 [16] deals with the duty to reduce the risk of disasters. The draft article is composed of two paragraphs. Paragraph 1 establishes the basic obligation to reduce the risk of disasters by taking certain measures, and paragraph 2 provides an indicative list of such measures.

(2) Draft article 11 [16] represents the acknowledgement of the need to cover in the draft articles on Protection of Persons in the Event of Disasters, not only the response phase of a disaster, but also the pre-disaster duties of States. The concept of disaster risk reduction has its origins in a number of General Assembly resolutions and has been further developed through the 1994 World Conference on Natural Disaster Reduction in Yokohama,[316] the 2005 Hyogo Framework for Action 2005–2015,[317] and several sessions of the Global Platform for Disaster Risk Reduction.

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[316] See Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and Plan of Action, A/CONF.172/9, chap. I, resolution I, annex I.

[317] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters ("Hyogo Framework for Action"), A/CONF.206/6 and Corr.1, chap. I, resolution 2.

(3) As stated in the 2005 Hyogo Declaration: "a culture of disaster prevention and resilience, and associated pre-disaster strategies, which are sound investments, must be fostered at all levels, ranging from the individual to the international levels … Disaster risks, hazards and their impacts pose a threat, but appropriate response to this can and should lead to actions to reduce risks and vulnerabilities in the future". At the fourth session of the Global Platform for Disaster Risk Reduction in 2013, the concluding summary by the Chair drew attention to the "growing recognition that the prevention and reduction of disaster risk is a legal obligation, encompassing risks assessments, the establishment of early warning systems, and the right to access risk information".

(4) The rule embodied in draft article 11 [16] draws inspiration from among the sources of law identified by Article 38, paragraph 1, of the Statute of the International Court of Justice. The Commission bases itself on the fundamental principles of State sovereignty and non-intervention and, at the same time, draws on principles emanating from international human rights law, including the States' obligation to respect, protect, and fulfil human rights, in particular the right to life. Protection not only relates to actual violations of human rights but also entails an affirmative obligation on States to take the necessary and appropriate measures which are designed to prevent the occurrence of such violations, no matter the source of the threat. This is confirmed by the decisions of international tribunals, notably the European Court of Human Rights judgments in the *Öneryildiz v. Turkey*[318] and *Budayeva and Others v. Russia*[319] cases, which affirmed the duty to take preventive measures. In addition, draft article 11 [16] draws from a number of international environmental law principles, including the "due diligence" principle.

(5) An important legal foundation for draft article 11 [16] is the widespread practice of States reflecting their commitment to reduce the risk of disasters. Many States have entered into multilateral, regional and bilateral agreements concerned with reducing the risk of disasters, including: the ASEAN Agreement;[320] the Beijing Action for Disaster Risk Reduction in Asia (2005); the Delhi Declaration on Disaster Risk Reduction in Asia (2007); the Kuala Lumpur Declaration on Disaster Risk Reduction in Asia (2008); the 2010 Fourth Asian Ministerial Conference on Disaster Risk Reduction, leading to the Incheon Declaration on Disaster Risk Reduction in Asia and the Pacific 2010, the Incheon Regional Roadmap and Action Plan on Disaster Risk Reduction through Climate Change Adaptation in Asia and the Pacific, reaffirming the Framework for Action and proposing Asian initiatives for climate change adaptation and disaster risk reduction considering vulnerabilities in the region;[321] the African Union Africa Regional Strategy for Disaster Risk Reduction of 2004, which was followed by a programme of action for its implementation (originally for the period 2005–2010, but later extended to 2015);[322] four sessions of the African Regional Platform for Disaster Risk Reduction, the most recent in 2013;[323] the Arab Strategy for Disaster Risk Reduction 2020, adopted by the Council of Arab Ministers Responsible for the Environment at its twenty-second session, in December

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[318] European Court of Human Rights, *Öneryildiz v. Turkey*, Case No. 48939, Grand Chamber, Judgment, 30 November 2004.

[319] European Court of Human Rights, *Budayeva and Others v. Russia*, Chamber (First Section), Case Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment, 20 March 2008.

[320] The Agreement is the first international treaty concerning disaster risk reduction to have been developed after the adoption of the Hyogo Framework for Action.

[321] For the text of the Declaration, see http:://www.preventionweb.net/files/16327_finalincheondeclaration1028.pdf.

[322] Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006–2015), Introduction.

[323] UNISDR, "Africa seeks united position on disaster risk reduction", 13 February 2013. Available from http://www.unisdr.org/archive/31224.

2010;[324] and, lastly, the Nayarit Communiqué on Lines of Action to Strengthen Disaster Risk Reduction in the Americas (2011).[325]

(6) Recognition of this commitment is further shown by the incorporation by States of disaster risk reduction measures into their national policies and legal frameworks. A compilation of national progress reports on the implementation of the Hyogo Framework[326] indicates that 64 States or areas reported having established specific policies on disaster risk reduction, evenly spread throughout all continents and regions, including the major hazard-prone locations. They are: Algeria, Anguilla, Argentina, Armenia, Bangladesh, Bolivia (Plurinational State of), Brazil, British Virgin Islands, Canada, Cape Verde, Chile, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Cuba, Dominican Republic, Fiji, Finland, Georgia, Germany, Ghana, Guatemala, Honduras, India, Indonesia, Italy, Japan, Kenya, Lao People's Democratic Republic, Lebanon, Madagascar, Malawi, Malaysia, Maldives, Marshall Islands, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Nepal, New Zealand, Nicaragua, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Saint Kitts and Nevis, Saint Lucia, Samoa, Senegal, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, the former Yugoslav Republic of Macedonia, United Republic of Tanzania, United States, Vanuatu and Venezuela (Bolivarian Republic of). More recently, the United Nations International Strategy for Disaster Reduction (UNISDR) has identified 76 States that have adopted national platforms, defined as a "coordinating mechanism for mainstreaming disaster risk reduction into development policies, planning and programmes", to implement disaster risk reduction strategies.[327] Several countries have adopted legislation specifically addressing disaster risk reduction either as stand-alone legislation or as part of a broader legal framework concerning both disaster risk management and disaster response, including: Algeria,[328] Cameroon,[329] China,[330] the Dominican Republic,[331] El Salvador,[332] Estonia,[333] France,[334] Guatemala,[335] Haiti,[336] Hungary,[337] India,[338] Indonesia,[339] Italy,[340] Madagascar,[341] Namibia,[342] New Zealand,[343]

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[324] For the text of the Strategy, see http://www.unisdr.org/files/18903_17934asdrrfinalenglishjanuary20111.pdf.

[325] For the text of the Communiqué, see http://www.unisdr.org/files/18603_communiquenayarit.pdf.

[326] Hyogo Framework for Action, priority 1, core indicator 1.1.

[327] For a list of States that have adopted national platforms, see http://www.unisdr.org/partners/countries.

[328] Algeria, Risk Prevention and Disaster Management Act of 25 December 2004.

[329] Cameroon, Arrêté No. 037/PM du 19 mars 2003 portant création, organisation et fonctionnement d'un Observatoire National des Risques.

[330] China, Disaster Prevention and Response Act (2002).

[331] Dominican Republic, Decree No. 874-09 approving the Regulation for the application of Law No. 147-02 on Risk Management and repealing Chapters 1, 2, 3, 4 and 5 of Decree No. 932-03 (2009).

[332] El Salvador, Law on Civil Protection, Disaster Prevention and Disaster Mitigation (2005).

[333] Estonia, Emergency Preparedness Act (2000).

[334] France, Law No. 2003-699 regarding the prevention of technological and natural risks and reparation of damages (2003).

[335] Guatemala, Decree No. 109-96, Law on the National Coordinator for the Reduction of Natural or Man-made Disasters (1996).

[336] Haiti, National Risk and Disaster Management Plan (1988).

[337] Hungary, Act LXXIV on the management and organization for the prevention of disasters and the prevention of major accidents involving dangerous substances (1999).

[338] India, Disaster Management Act, No. 53 (2005).

[339] Indonesia, Law No. 24 of 2007 Concerning Disaster Management.

[340] Italy, Decree of the Prime Minister to establish a national platform for disaster risk reduction (2008).

[341] Madagascar, Decree No. 2005-866 setting out the manner of application of Law No. 2003-010 of 5 September 2003 on the national risk and disaster management policy (2005).

[342] Namibia, Disaster Risk Management Act (2012).

Pakistan,[344] Peru,[345] the Philippines,[346] the Republic of Korea,[347] Slovenia,[348] South Africa,[349] Thailand[350] and the United States.[351]

(7) Draft article 11 [16] is to be read together with the rules of general applicability in the present draft articles, including those principally concerned with the response to a disaster.

*Paragraph 1*

(8) Paragraph 1 starts with the words "Each State". The Commission opted for this formula over "States" for the sake of consistency with the draft articles previously adopted, where care had been taken to identify the State or States which bore the legal duty to act. In contrast to those draft articles dealing directly with disaster response where a distinction exists between an affected State or States and other States, in the pre-disaster phase the obligation in question applies to every State. Furthermore, as is evident from paragraph 2, the obligation to reduce risk implies measures primarily taken at the domestic level. Any such measures requiring interaction between States or with other assisting actors are meant to be covered by article 10 [5 *ter*]. In other words, the obligation applies to each State individually. Hence the Commission decided against using the word "States" also to avoid any implication of a collective obligation.

(9) The word "shall" signifies the existence of the international legal obligation to act in the manner described in the paragraph and is the most succinct way to convey the sense of that legal obligation. This is confirmed by the title of the draft article, which refers to the "duty" to reduce the risk of disasters. While each State bears the same obligation, the question of different levels of capacity among States to implement the obligation is dealt with under the phrase "by taking the necessary and appropriate measures".

(10) The obligation is to "reduce the risk of disasters".[352] The Commission adopted the present formula in recognition of the fact that the contemporary view of the international community, as reflected in several major pronouncements, notably in the Hyogo Declaration issued at the 2005 World Conference on Disaster Reduction, is that the focus should be placed on the reduction of the risk of harm caused by a hazard, as distinguished from the prevention of disasters themselves. Accordingly, the emphasis in paragraph 1 is placed on the reduction of the risk of disasters. This is achieved by taking certain measures so as to prevent, mitigate and prepare for such disasters.

(11) The phrase "by taking the necessary and appropriate measures" indicates the specific conduct being required. In addition to the further specification about legislation and

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[343] New Zealand, National Civil Defence Emergency Management Plan Order 2005 (SR 2005/295), part 3.

[344] Pakistan, National Disaster Management Act (2010). See also the official statement of the Government of Pakistan at the third session of the Global Platform for Disaster Risk Reduction, in 2011, available from http://www.preventionweb.net/files/globalplatform/pakistanofficialstatement.pdf.

[345] Peru, Law No. 29664 creating the National System for Disaster Risk Management (2011).

[346] The Philippines, Philippine Disaster Risk Management Act (2006).

[347] Republic of Korea, National Disaster Countermeasures Act (1995); National Disaster Management Act (2010).

[348] Slovenia, Act on the Protection against Natural and Other Disasters (2006).

[349] South Africa, Disaster Management Act No. 57 of 2002.

[350] Thailand, Disaster Prevention and Mitigation Act (2007).

[351] United States, Disaster Mitigation Act (2000).

[352] The Commission notes the existence of a linguistic difference involving the United Nations official translation into French of the term "Disaster Risk Reduction" (DRR).

regulations explained in paragraph (13) below, the "measures" to be taken are qualified by the words "necessary" and "appropriate" which accord with common practice. What might be "necessary and appropriate" in any particular case is to be understood in terms of the stated goal of the measures to be taken, namely "to prevent, mitigate, and prepare for disasters" so as to reduce risk. This is to be evaluated within the broader context of the existing capacity and availability of resources of the State in question, as has been noted in paragraph (9) above. The fundamental requirement of due diligence is inherent to the concept of "necessary and appropriate". It is further understood that the question of the effectiveness of the measures is implied in that formula.

(12) The paragraph indicates by means of the phrase "including through legislation and regulations", the specific context in which the corresponding measures are to be taken. The envisaged outcome consists of a number of concrete measures which typically are taken within the context of a legislative or regulatory framework. Accordingly, for those States which do not already have such a framework in place, the general obligation to reduce the risk of disasters would also include an obligation to put such a legal framework into place so as to allow for the taking of the "necessary and appropriate" measures. The phrase "legislation and regulations" is meant to be understood in broad terms to cover as many manifestations of law as possible, it being generally recognized that such law-based measures are the most common and effective way to facilitate (hence the word "through") the taking of disaster risk reduction measures at the domestic level.

(13) The qualifier "including" indicates that while "legislation and regulations" may be the primary methods, there may be other arrangements under which such measures could be taken. The word "including" was chosen in order to avoid the interpretation that the adoption and implementation of specific legislation and regulations would always be required. This allows a margin of discretion for each State to decide on the applicable legal framework, it being understood that having in place a legal framework which anticipates the taking of "the necessary and appropriate measures" is a *sine qua non* for disaster risk reduction. The use of the definite article "the" before "necessary", therefore, serves the function of specifying that it is not just any general measures which are being referred to, but rather, specific, and concrete, measures aimed at prevention, mitigation and preparation for disasters.

(14) The phrase "through legislation and regulations" imports a reference to ensuring that mechanisms for implementation and accountability for non-performance be defined within domestic legal systems. Since such issues, though important, are not the only ones which could be the subject of legislation and regulations in the area of disaster risk reduction, singling them out in the text of paragraph 1 could have led to a lack of clarity.

(15) The last clause, namely "to prevent, mitigate, and prepare for disasters" serves to describe the purpose of the "necessary and appropriate" measures which States are to take during the pre-disaster phase, with the ultimate goal of reducing their exposure to the risk of disasters. The phrase tracks the now well-accepted formula used in major disaster risk reduction instruments. The Commission was cognizant of the fact that adopting a different formulation could result in unintended *a contrario* interpretations as to the kinds of activities being anticipated in the draft article.

(16) To illustrate the meaning of each of the three terms used, prevention, mitigation and preparedness, the Commission deems it appropriate to have recourse to the Terminology on Disaster Risk Reduction prepared by UNISDR in 2009,[353] according to which:

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[353] See http://www.unisdr.org/we/inform/terminology.

> (i) "Prevention is 'the outright avoidance of adverse impacts of hazards and related disasters'…
>
> Prevention (i.e. disaster prevention) expresses the concept and intention to completely avoid potential adverse impacts through action taken in advance … Very often the complete avoidance of losses is not feasible and the tasks transform to that of mitigation. Partly for this reason, the terms prevention and mitigation are sometimes used interchangeably in casual use;"
>
> (ii) "Mitigation is 'the lessening or limitation of the adverse impacts of hazards and related disasters' …
>
> The adverse impacts of hazards often cannot be prevented fully, but their scale or severity can be substantially lessened by various strategies and actions … It should be noted that in climate change policy 'mitigation' is defined differently, being the term used for the reduction of greenhouse gas emissions that are the source of climate change;"[354]
>
> (iii) "Preparedness is 'the knowledge and capacities developed by governments, professional response and recovery organizations, communities and individuals to effectively anticipate, respond to and recover from the impacts of likely, imminent or current hazard events or conditions' …
>
> Preparedness action is carried out within the context of disaster risk management and aims to build the capacities needed to efficiently manage all types of emergencies and achieve orderly transitions from response through sustained recovery. Preparedness is based on a sound analysis of disaster risks and good linkages with early warning systems … [The measures to be taken] must be supported by formal institutional, legal and budgetary capacities."

*Paragraph 2*

(17) Paragraph 2 lists three categories of disaster risk reduction measures, namely: the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems. As noted in paragraph (3), these three measures were singled out in the Chair's summary at the conclusion of the fourth session of the Global Platform for Disaster Risk Reduction held in May 2013. The Commission decided to refer expressly to the listed three examples as reflecting the most prominent types of contemporary disaster risk reduction efforts. The word "include" serves to indicate that the list is non-exhaustive. The listing of the three measures is without prejudice to other activities aimed at the reduction of the risk of disasters which are being undertaken at present, or which may be undertaken in the future.

(18) The practical measures that can be adopted are innumerable and depend on the social, environmental, financial, cultural, and other relevant circumstances. Practice in the public and private sectors provides a wealth of examples. Among them may be cited: community-level preparedness and education; the establishment of institutional frameworks; contingency planning; setting up of monitoring mechanisms; land-use controls; construction standards; ecosystems management; drainage systems; funding; and insurance.

(19) The three consecutive measures listed in paragraph 2 share a particular characteristic: they are instrumental to the development and applicability of many if not all

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[354] The Commission is conscious of the discrepancy in the concordance between the English and French versions of the official United Nations use of the term "mitigation".

other measures, for instance in decision-making, concerning definitions of priorities or investment planning, both in the public and the private sector.

(20) The first measure — risk assessments — is about generating knowledge concerning both hazards and vulnerabilities. As such, it is the first step towards any sensible measure to reduce the risk of disasters. Without a sufficiently solid understanding of the circumstances surrounding disasters and their characteristics, no effective measure can be enacted. Risk assessments also compel a closer look at local realities and the engagement of local communities.

(21) The second measure — the collection and dissemination of risk and past loss information — is the next step. Reducing disaster risk requires action by all actors in the public and private sectors and civil society. Collection and dissemination should result in the free availability of risk and past loss information, which is an enabler of effective action. It allows all stakeholders to assume responsibility for their actions and to make a better determination of priorities for planning purposes; it also enhances transparency in transactions and public scrutiny and control. The Commission wishes to emphasize the desirability of the dissemination and free availability of risk and past loss information, as it is the reflection of the prevailing trend focusing on the importance of public access to such information. The Commission, while recognizing the importance of that trend, felt that it was best dealt with in the commentary and not in the body of paragraph 2, since making it a uniform legal requirement could prove burdensome for States.

(22) The third measure concerns early warning systems, which are instrumental both in initiating and implementing contingency plans, thus limiting the exposure to a hazard; as such, they are a pre-requisite for effective preparedness and response.

(23) As it has been explained in paragraph (11), draft article 11 [16] concerns the taking of the envisaged measures within the State. Any inter-State component would be covered by the duty to cooperate in draft article 9 [5], read together with draft article 10 [5 *ter*]. Accordingly, the extent of any international legal duty relating to any of the listed and not listed measures that may be taken in order to reduce the risk of disasters is to be determined by way of the relevant specific agreements or arrangements each State has entered into with other actors with which it has the duty to cooperate.

### Article 12 [9]
### Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

### Commentary

(1) Draft article 12 [9] is addressed towards an affected State in the context of the protection of persons in the event of a disaster upon its territory. Paragraph 1 reflects the obligation of an affected State to protect persons and to provide disaster relief and assistance in accordance with international law. Paragraph 2 affirms the primary role held by an affected State in the response to a disaster upon its territory, or a territory or area under its jurisdiction or control. Draft article 12 [9] is premised on the core principles of sovereignty and non-intervention, respectively, as enshrined in the Charter of the United

Nations,[355] and recognized in numerous international instruments.[356] In the context of disaster relief, General Assembly resolution 46/182 affirms that "[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations".[357]

(2) Paragraph 1 affirms that the duty held by an affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory stems from its sovereignty. This conception of a bond between sovereign rights and concomitant duties upon a State was expressed by Judge Álvarez in a separate opinion in the *Corfu Channel case*:

> "By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them."[358]

The Commission considered several formulations for this concept, including the phrases "in the exercise of its sovereignty" and "in the exercise of its sovereign rights and duties", before settling on the present text. The modifying phrase "by virtue of its sovereignty" emphasizes that the affected State, which benefits from the principle of non-intervention, is the party that holds the duty to protect persons located within its territory or within a territory or area under its jurisdiction or control. The Commission determined that the term "duty" was more appropriate than that of "responsibility". It considered that use of the term "responsibility" could give rise to confusion given its use as a term of art elsewhere in the Commission's work.

(3) Paragraph 2 further reflects the primary role held by a State in disaster response. This position is rooted in the core principles of State sovereignty and non-intervention at international law. For the reasons expressed above, the Commission decided to adopt the word "role" rather than "responsibility" in articulating the position of an affected State. The adoption of the term "role" was informed by General Assembly resolution 46/182, which affirms *inter alia* that an affected State "has the primary role in the initiation, organization,

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[355] Charter of the United Nations, Art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its members"); Art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII").

[356] See, e.g., the Declaration on Principles on International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex (noting *inter alia* that "[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community", that "[t]he use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention", and that "States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention"). The International Court of Justice has held that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations"; *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment, Merits, I.C.J. Reports 1949*, p. 4, at p. 35.

[357] General Assembly resolution 46/182 of 19 December 1991, annex, para. 3.

[358] *Corfu Channel case*, Separate Opinion by Judge Álvarez, p. 43. See also the opinion expressed by Max Huber, Arbitrator, in the Island of Palmas case, Award of 4 April 1928, *Reports of International Arbitral Awards*, vol. II, p. 839 ("Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States …").

coordination, and implementation of humanitarian assistance within its territory".[359] Use of the word "role" rather than "responsibility" was also considered to allow a margin of appreciation to States in the coordination of disaster response activities. Language implying an obligation upon States to direct or control disaster response activities may conversely be restrictive on States that preferred to take a more limited role in disaster response coordination or faced a situation of limited resources.

(4) The primacy of an affected State is also informed by the long-standing recognition in international law that the government of a State is best placed to determine the gravity of an emergency situation and to frame appropriate response policies. The affirmation in paragraph 2 that an affected State holds the primary role in the direction, control, coordination and supervision of disaster relief and assistance should be read in concert with the duty of cooperation outlined in draft article 8 [5]. In this context, draft article 12 [9], paragraph 2, affirms that an affected State holds the primary position in cooperative relationships with other relevant actors that are contemplated in draft article 8 [5].

(5) Reference to the "direction, control, coordination and supervision" of disaster relief and assistance is drawn from article 4, paragraph 8 of the Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations.[360] The Commission considered that the Tampere Convention formula was gaining general currency in the field of disaster relief and assistance and represented a more contemporary construction.[361] The formula reflects the position that a State exercises final control over the manner in which relief operations are carried out in accordance with international law.

(6) The Commission departed from the Tampere Convention in deciding not to include a reference to "national law" in its articulation of the primary role of an affected State. In the context of the Tampere Convention, the reference to national law indicates that appropriate coordination requires consistency with an affected State's domestic law. The Commission decided not to include this reference in light of the fact that the internal law of an affected State may not in all cases regulate or provide for the primary position of a State in disaster response situations.

### Article 13 [10]
### Duty of the affected State to seek external assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

### Commentary

(1) Draft article 13 [10] addresses the particular situation in which a disaster exceeds a State's national response capacity. In these circumstances, an affected State has the duty to

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[359] General Assembly resolution 46/182 of 19 December 1991, annex, para. 4.

[360] Tampere Convention (noting that "[n]othing in this Convention shall interfere with the right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory").

[361] See, e.g., the ASEAN Agreement, art. 3, para. 2 (noting that "[t]he Requesting or Receiving Party shall exercise the overall direction, control, co-ordination and supervision of the assistance within its territory"); the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, United Nations, *Treaty Series*, vol. 1457, No. 24643, p. 133, art. 3 (a) (noting *inter alia* that unless otherwise agreed, "the overall direction, control, co-ordination and supervision of the assistance shall be the responsibility within its territory of the requesting State").

seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations. The duty expounded in draft article 13 [10] is a specification of draft article 12 [9] and draft article 8 [5]. Paragraph 1 of draft article 12 [9] stipulates that an affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. The draft article affirms the central position of obligations owed by States towards persons within its borders. The duty to cooperate also underlies an affected State's duty to the extent that a disaster exceeds its national response capacity. Draft article 8 [5] affirms that the duty to cooperate is incumbent upon not only potential assisting States, but also affected States where such cooperation is appropriate. The Commission considers that such cooperation is both appropriate and required to the extent that an affected State's national capacity is exceeded. In these circumstances, seeking assistance is additionally an element of the fulfilment of an affected State's primary responsibilities under international human rights instruments and customary international law. The existence of the duty to seek assistance as set out in draft article 13 [10] was supported by a majority of the members of the Commission, but opposed by others, since in the view of those members, international law as it currently stands does not recognize such a duty.

(2) The draft article stresses that a duty to seek assistance arises only to the extent that the national response capacity of an affected State is exceeded. Not all disasters are considered to overwhelm a nation's response capacity. The Commission therefore considers the present draft article only to be applicable to a subset of disasters as defined in draft article 3 [3].

(3) The Commission adopted the phrase "to the extent that" in order to clarify that the national response capacity of an affected State is rarely conceptualized as sufficient or insufficient in absolute terms. An affected State's national capacity may be exceeded in relation to one aspect of disaster relief operations, although the State remains capable of undertaking other operations. As a whole, the phrase "[t]o the extent that a disaster exceeds its national response capacity" encompasses the situation in which a disaster appears likely to exceed an affected State's national response capacity. This flexible and proactive approach is in line with the fundamental purpose of the draft articles as expressed in draft article 2 [2]. The approach facilitates an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights. Recognition of the duty upon States in these circumstances reflects the Commission's concern to enable the provision of timely and effective disaster relief assistance.

(4) The Commission considers that the duty to seek assistance in draft article 13 [10] also derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where an affected State considers its own resources are inadequate to meet protection needs. While this may occur also in the absence of any disaster, a number of human rights are directly implicated in the context of a disaster, including the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right to be free from discrimination.[362] The Commission notes that the Human Rights Committee has held that a State's duty in the fulfilment of the right to life extends beyond mere respect to encompass a duty to protect and fulfil the substantive right.[363] The right to life is non-derogable under

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[362] See the examples listed in document A/CN.4/598, para. 26.

[363] See Human Rights Committee, General Comment No. 6 (The Right to Life), 30 April 1982, para. 5.

the International Covenant on Civil and Political Rights, even in the event of a "public emergency threatening the life of a nation"[364] – which has been recognized to include a "natural catastrophe" by the Human Rights Committee in General Comment No. 29.[365] The International Covenant on Economic, Social and Cultural Rights states that in pursuance of the right to food:

> "[t]he States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[366]

The Committee on Economic, Social and Cultural Rights noted, in General Comment No. 12 on the Right to Adequate Food, that if a State party maintains that resource constraints make it impossible to provide access to food to those in need:

> "the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. [...] A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food".[367]

The Commission therefore notes that "appropriate steps" to be taken by a State include seeking international assistance where domestic conditions are such that the right to food cannot be realized. It is relevant that this step is engaged where a State itself asserts that it is unable to carry out its obligations.

(5) Specific references to the protection of rights in the event of disasters are made in the African Charter on the Rights and Welfare of the Child,[368] and the Convention on the Rights of Persons with Disabilities.[369] Under article 23 of the African Charter on the Rights and Welfare of the Child, States shall take "all appropriate measures" to ensure that children seeking or holding refugee status, as well as those who are internally displaced due to events including "natural disaster", are able to "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties". The Convention on the Rights of Persons with Disabilities refers to the obligation of States towards disabled persons in the event of disasters:

> "States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters."[370]

The Commission considers that the phrase "all necessary measures" may encompass recourse to possible assistance from members of the international community in the event that an affected State's national capacity is exceeded. Such an approach would cohere with the guiding principle of humanity as applied in the international legal system. The International Court of Justice affirmed in the *Corfu Channel case (merits)* that elementary considerations of humanity are considered to be general and well-recognized principles of the international legal order, "even more exacting in peace than in war".[371] Draft article 7 [6] affirms the core position of the principle of humanity in disaster response.

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[364] International Covenant on Civil and Political Rights, 1966, art. 6 (1).

[365] Human Rights Committee, General Comment No. 29 (States of Emergency (art. 4)), 24 July 2001, para. 5.

[366] International Covenant on Economic, Social and Cultural Rights, 1966, art. 11.

[367] Committee on Economic, Social and Cultural Rights, General Comment No. 12 (The right to adequate food (art. 11)), 1999, para. 17.

[368] African Charter on the Rights and Welfare of the Child, 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

[369] United Nations Convention on the Rights of Persons with Disabilities, General Assembly resolution 61/106 of 13 December 2006, annex I.

[370] *Ibid.*, art. 11.

(6) The Commission considers that a duty to "seek" assistance is more appropriate than a duty to "request" assistance in the context of draft article 13 [10]. The Commission derives this formulation from the duty outlined in the resolution on humanitarian assistance adopted by the Institute of International Law, which notes:

> "[w]henever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States."[372]

Similarly, the IFRC Guidelines hold that:

> "[i]f an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons."[373]

In addition, the guiding principles annexed to General Assembly resolution 46/182 also appear to support an implicit duty on affected States to engage in international cooperation where an emergency exceeds its response capacity:

> "The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws."[374]

(7) The alternate formulation of "request" is incorporated in the Oslo Guidelines, which note that "[i]f international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximise its effectiveness".[375] The Commission considers that a "request" of assistance carries an implication that an affected State's consent is granted upon acceptance of that request by a third State. In contrast, the Commission is of the view that a duty to "seek" assistance implies a broader, negotiated approach to the provision of international aid. The term "seek" entails the proactive initiation by an affected State of a process through which agreement may be reached. Draft article 13 [10] therefore places a duty upon affected States to take positive steps actively to seek out assistance to the extent that a disaster exceeds its national response capacity.

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[371] *Corfu Channel case* (*United Kingdom of Great Britain and Northern Ireland v. Albania, Judgment, Merits, I.C.J. Reports 1949*, p. 4, at p. 22 (noting that "[t]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ...").

[372] Resolution on humanitarian assistance, art. III, para. 3.

[373] IFRC Guidelines, guideline 3 (2).

[374] General Assembly resolution 46/182 of 19 December 1991, annex, para. 5.

[375] Oslo Guidelines, para. 58.

(8) The Commission considers that the Government of an affected State will be in the best position to determine the severity of a disaster situation and the limits of its national response capacity. The Commission considers that the assessment of the severity of a disaster by an affected State must be carried out in good faith. The principle of good faith is expounded in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[376] which stipulates that "[e]very State has the duty to fulfil in good faith" obligations assumed by it "in accordance with the Charter of the United Nations",[377] "obligations under the generally recognized principles and rules of international law",[378] and "obligations under international agreements valid under the generally recognized principles and rules of international law".[379] A good faith assessment of the severity of a disaster is an element of an affected State's duty, by virtue of its sovereignty, to ensure the protection of persons and provision of disaster relief and assistance on its territory pursuant to draft article 12 [9], paragraph 1.

(9) The phrase "as appropriate" was adopted by the Commission to emphasize the discretionary power of an affected State to choose from among various States, the United Nations, competent intergovernmental organizations, and relevant non-governmental organizations the assistance that is most appropriate to its specific needs. The term further reflects that the duty to seek assistance does not imply that a State is obliged to seek assistance from every source listed in draft article 13 [10]. The phrase "as appropriate" therefore reinforces the fact that an affected State has the primary role in the direction, control, coordination and supervision of the provision of disaster relief and assistance, as outlined in draft article 12 [9], paragraph 2.

(10) The existence of a duty to seek assistance to the extent that national capacity is exceeded should not be taken to imply that the Commission does not encourage affected States to seek assistance in disaster situations of a lesser magnitude. The Commission considers cooperation in the provision of assistance at all stages of disaster relief to be central to the facilitation of an adequate and effective response to disasters, and a practical manifestation of the principle of solidarity. Even if an affected State is capable and willing to provide the required assistance, cooperation and assistance by international actors will in many cases ensure a more adequate, rapid and extensive response to disasters and an enhanced protection of affected persons.

### Article 14 [11]
### Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer.

### Commentary

(1) Draft article 14 [11] addresses consent of an affected State to the provision of external assistance. As a whole, it creates for affected States a qualified consent regime in the field of disaster relief operations. Paragraph 1 reflects the core principle that

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[376] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[377] *Ibid.*

[378] *Ibid.*

[379] *Ibid.*

implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph 2 stipulates that consent to external assistance shall not be withheld arbitrarily, while paragraph 3 places a duty upon an affected State to make known its decision regarding an offer of assistance whenever possible.

(2) The principle that the provision of external assistance requires the consent of the affected State is fundamental to international law. Accordingly, paragraph 3 of the guiding principles annexed to General Assembly resolution 46/182 notes that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country".[380] The Tampere Convention stipulates that "[n]o telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party",[381] while the ASEAN Agreement on Disaster Management notes that "external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party".[382] Recognition of the requirement of State consent to the provision of external assistance comports with the recognition in draft article 12 [9], paragraph 2, that an affected State has the primary role in the direction, control, coordination and supervision of disaster relief and assistance on its territory.

(3) The recognition, in paragraph 2, that an affected State's right to refuse an offer is not unlimited reflects the dual nature of sovereignty as entailing both rights and obligations. This approach is reflected in paragraph 1 of draft article 12 [9], which affirms that an affected State, "by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory". On the other hand, some members of the Commission were of the view that the duty not to arbitrarily withhold consent was not recognized by international law.

(4) The Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory in the event of a disaster is aimed at preserving the life and dignity of the persons affected by the disaster and guaranteeing the access of persons in need to humanitarian assistance. This duty is central to securing the right to life of those within an affected State's territory.[383] The Human Rights Committee has interpreted the right to life as embodied in article 6 of the International Covenant of Civil and Political Rights to contain the obligation for States to adopt positive measures to ensure the enjoyment of this right.[384] An offer of assistance that is met with refusal might thus under certain conditions constitute a violation of the right to life. The General Assembly reaffirmed in resolutions 43/131 and 45/100 that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".[385]

(5) Recognition that an affected State's discretion regarding consent is not unlimited is reflected in the Guiding Principles on Internal Displacement.[386] The Guiding Principles, which have been welcomed by the former Commission on Human Rights and the General

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[380] General Assembly resolution 46/182 of 19 December 1991, annex, para. 3.

[381] Tampere Convention, art. 4, para. 5.

[382] ASEAN Agreement, art. 3, para. 1.

[383] See International Covenant on Civil and Political Rights , art. 6, para. 1.

[384] Human Rights Committee, General Comment No. 6 (The Right to Life), para. 5 ("The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.").

[385] General Assembly resolution 43/131 of 8 December 1988, preambular paragraph 8; General Assembly resolution 45/100 of 14 December 1990, preambular paragraph 6.

[386] E/CN.4/1998/53/Add.2.

Assembly in unanimously adopted resolutions and described by the Secretary-General as "the basic international norm for protection" of internally displaced persons, note:[387]

> "[c]onsent [to offers of humanitarian assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance".[388]

The Institute of International Law dealt twice with the question of consent in the context of humanitarian assistance. Its 1989 resolution entitled "The Protection of Human Rights and the Principle of Non-intervention in the Internal Affairs of States", article 5, paragraph 2, states in the authoritative French text:

> "Les États sur le territoire desquels de telles situations de détresse [où la population est gravement menacée dans sa vie ou sa santé] existent ne refuseront pas arbitrairement de pareilles offres de secours humanitaires."[389]

In 2003, the Institute of International Law revisited this issue, stipulating in its Resolution on Humanitarian Assistance under the heading "Duty of affected States not arbitrarily to reject a bona fide offer of humanitarian assistance":

> "Affected States are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare."[390]

(6) The term "withheld" implies a temporal element to the determination of arbitrariness. Both the refusal of assistance, and the failure of an affected State to make known a decision in accordance with draft article 14 [11], paragraph 3 within a reasonable time frame, may be deemed arbitrary. This view is reflected in General Assembly resolutions 43/131[391] and 45/100,[392] which each include the following preambular paragraphs:

> "Concerned about the difficulties that victims of natural disasters and similar emergency situations may experience in receiving humanitarian assistance,
>
> Convinced that, in providing humanitarian assistance, in particular the supply of food, medicines or health care, for which access to victims is essential, rapid relief will avoid a tragic increase in their number."

The 2000 Framework Convention on Civil Defence Assistance likewise reflects among the principles that States parties, in terms of providing assistance in the event of a disaster, undertake to respect that "[o]ffers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time".[393]

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[387] A/59/2005, para. 210.

[388] E/CN.4/1998/53/Add.2, Principle 25, para. 2.

[389] Institute of International Law, Resolution on the protection of human rights and the principle of non-intervention in the internal affairs of States, 13 September 1989, Santiago de Compostela, art. 5, para. 2. The French text is presented in mandatory language, while the English translation reads: "States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance." The explanatory text "où la population est gravement menacée dans sa vie ou sa santé" is drawn from art. 5, para. 1 of that resolution.

[390] Resolution on humanitarian assistance, art. VIII, para. 1.

[391] General Assembly resolution 43/131 of 8 December 1988, preambular paragraphs 9 and 10.

[392] General Assembly resolution 45/100 of 14 December 1990, preambular paragraphs 8 and 9.

(7) The term "arbitrary" directs attention to the basis of an affected State's decision to withhold consent. The determination of whether the withholding of consent is arbitrary must be determined on a case-by-case basis, although as a general rule several principles can be adduced. First, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not extended in accordance with the present draft articles. In particular, draft article 7 [6] establishes that humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available, there would be a strong inference that a decision to withhold consent is arbitrary.

(8) An affected State's discretion to determine the most appropriate form of assistance is an aspect of its primary role in the direction, control, coordination and supervision of disaster relief and assistance under draft article 12 [9], paragraph 2. This discretion must be exercised in good faith in accordance with an affected State's international obligations.[394] The Commission nonetheless encourages affected States to give reasons where consent to assistance is withheld. The provision of reasons is fundamental to establishing the good faith of an affected State's decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.

(9) In paragraph 3, the Commission opted for the phrase "make known its decision regarding the offer" to give the maximum flexibility to affected States in determining how best to respond to offers of assistance. It was recognized that a rigid duty formally to respond to every offer of assistance may place too high a burden on affected States in disaster situations. The Commission considers the current phrase to encompass a wide range of possible means of response, including a general publication of the affected State's decision regarding all offers of assistance. The paragraph applies to both situations where an affected State accepts assistance and situations in which an affected State withholds its consent.

(10) The Commission considers the phrase "whenever possible" to have a very restricted scope. The phrase directs attention to extreme situations where a State is incapable of forming a view regarding consent due to the lack of a functioning government or circumstances of equal incapacity. The Commission is further of the view that an affected State is capable of making its decision known in the manner it feels most appropriate absent the exceptional circumstances outlined in this paragraph.

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[393] Framework Convention on Civil Defence Assistance, art. 3, para. (e).

[394] See, e.g., General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1 (noting *inter alia* that "[e]very State has the duty to fulfil in good faith" obligations assumed by it "in accordance with the Charter of the United Nations", "obligations under the generally recognized principles and rules of international law", and "obligations under international agreements valid under the generally recognized principles and rules of international law").

### Article 15 [13]
### Conditions on the provision of external assistance

**The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.**

#### Commentary

(1) Draft article 15 [13] addresses the establishment of conditions by affected States on the provision of external assistance on their territory. It affirms the right of affected States to place conditions on such assistance, in accordance with the present draft articles and applicable rules of international and national law. The draft article indicates how such conditions are to be determined. The identified needs of the persons affected by disasters and the quality of the assistance guide the nature of the conditions. It also requires the affected State, when formulating conditions, to indicate the scope and type of assistance sought.

(2) The draft article furthers the principle enshrined in draft article 12 [9], which recognizes the primary role of the affected State in the direction, control, coordination and supervision of disaster relief and assistance on its territory. By using the phrasing "may place conditions", which accords with the voluntary nature of the provision of assistance, draft article 15 [13] acknowledges the right of the affected State to establish conditions for such assistance, preferably in advance of a disaster's occurrence but also in relation to specific forms of assistance by particular actors during the response phase. The Commission makes reference to "external" assistance because the scope of the provision covers the assistance provided by third States or other assisting actors, such as competent international organizations, but not assistance provided from internal sources, such as domestic non-governmental organizations.

(3) The draft article places limits on an affected State's right to condition assistance, which must be exercised in accordance with applicable rules of law. The second sentence outlines the legal framework within which conditions may be imposed, which comprises "the present draft articles, applicable rules of international law, and the national law of the affected State." The Commission included the phrase "the present draft articles" to stress that all conditions must be in accordance with the principles reflected in the draft articles, there being no need to repeat an enumeration of the humanitarian and legal principles already addressed elsewhere, notably, good faith, sovereignty and the humanitarian principles dealt with in draft article 7 [6], that is, humanity, neutrality, impartiality and non-discrimination.

(4) The reference to national law emphasizes the authority of domestic laws in the particular affected area. It does not, however, imply the prior existence of national law (internal law) addressing the specific conditions imposed by an affected State in the event of a disaster. Although there is no requirement of specific national legislation before conditions can be fixed, they must be in accordance with whatever relevant domestic legislation is in existence in the affected State, as envisaged in draft article 17 [14].

(5) The affected State and the assisting actor must both comply with the applicable rules of national law of the affected State. The affected State may only impose conditions that are in accordance with such laws, and the assisting actor must comply with such laws at all times throughout the duration of assistance. This reciprocity is not made explicit in the draft article, since it is inherent in the broader principle of respect for national law. Existing

international agreements support the affirmation that assisting actors must comply with national law. The ASEAN Agreement, for example, provides in article 13 (2) that "[m]embers of the assistance operation shall respect and abide by all national laws and regulations". Several other international agreements also require assisting actors to respect national law[395] or to act in accordance with the law of the affected State.[396]

(6) The duty of assisting actors to respect national law implies the obligation to require that: members of the relief operation observe the national laws and regulations of the affected State,[397] the head of the relief operation takes all appropriate measures to ensure the observance of the national laws and regulations of the affected State,[398] and assisting personnel cooperate with national authorities.[399] The obligation to respect the national law and to cooperate with the authorities of the affected State accords with the overarching principle of the sovereignty of the affected State and the principle of cooperation.

(7) The right to condition assistance is the recognition of a right of the affected State to deny unwanted or unneeded assistance, and to determine what and when assistance is appropriate. The third sentence of the draft article gives an explanation of what is required of conditions set by affected States, namely, that they must "take into account" not only the identified needs of the persons affected by disasters but also the quality of the assistance. Nevertheless, the phrase "take into account" does not denote that conditions relating to the identified needs and the quality of assistance are the only ones which States can place on the provision of external assistance.

(8) The Commission included the word "identified" to signal that the needs must be apparent at the time conditions are set and that needs can change as the situation on the ground changes and more information becomes available. It implies that conditions should not be arbitrary, but be formulated with the goal of protecting those affected by a disaster. "Identified" indicates there must be some process by which needs are made known, which can take the form of a needs assessment, preferably also in consultation with assisting actors. However, the procedure to identify needs is not predetermined, and it is left to the affected State to follow the most suitable one. This is a flexible requirement that may be satisfied according to the circumstances of a disaster and the capacities of the affected State. In no instance should identifying needs hamper or delay prompt and effective assistance. The provision of the third sentence is meant to "meet the essential needs of the persons concerned" in the event of a disaster, as expressed in draft article 2 [2], and should be viewed as further protection of the rights and needs of persons affected by disasters. The reference to "needs" in both draft articles is broad enough to encompass the special needs of women, children, the elderly, persons with disabilities, and vulnerable or disadvantaged persons and groups.

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[395] See, e.g., the Inter-American Convention to Facilitate Disaster Assistance, 1991, arts. VIII and XI (d); and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986, art. 8 (7).

[396] *Ibid*; Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, 1998, arts. 5 and 9.

[397] See, e.g., Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, United Nations, *Treaty Series*, vol. 2105, p. 457, annex X (1) ("The personnel involved in the assisting operation shall act in accordance with the relevant laws of the requesting Party.").

[398] See, e.g., ASEAN Agreement, art. 13 (2) ("The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations.").

[399] See, e.g. Peter MacAlister-Smith, *Draft international guidelines for humanitarian assistance operations*, para. 22 (b) ("At all times during humanitarian assistance operations the assisting personnel shall… [c]ooperate with the designated competent authority of the receiving State.").

(9) The inclusion of the word "quality" is meant to ensure that affected States have the right to reject assistance that is not necessary or that may be harmful. Conditions may include restrictions based on, *inter alia*, safety, security, nutrition and cultural appropriateness.

(10) Draft article 15 [13] contains a reference to the "scope and type of assistance sought." This is in line with previous international agreements that contain a similar provision.[400] By the use of the words "shall indicate" the draft article puts the onus on the affected State to specify the type and scope of assistance sought when placing conditions on assistance. At the same time, it implies that once fixed, the scope and type of such assistance will be made known to the assisting actors that may provide it, which would facilitate consultations. This will increase the efficiency of the assistance process, and will ensure that appropriate assistance reaches those in need in a timely manner.

(11) The Commission considered several possibilities for the proper verb to modify the word "conditions". The Commission's decision to use two different words, "place" and "formulate", is a stylistic choice that does not imply differentiation of meaning between the two uses.

### Article 16 [12]
### Offers of external assistance

In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

### Commentary

(1) Draft article 16 [12] acknowledges the interest of the international community in the protection of persons in the event of disasters, which is to be viewed as complementary to the primary role of the affected State enshrined in draft article 12 [9]. It is an expression of the principle of solidarity underlying the whole set of draft articles on the topic and, in particular, of the principle of cooperation embodied in draft articles 8 [5], 9 [5 *bis*] and 10 [5 *ter*].

(2) Draft article 16 [12] is only concerned with "offers" of assistance, not with the actual "provision" thereof. Such offers, whether made unilaterally or in response to a request, are essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist. Nor does an offer of assistance create for the affected State a corresponding obligation to accept it. In line with the fundamental principle of sovereignty informing the whole set of draft articles, an affected State may accept in whole or in part, or not accept, offers of assistance from States or non-State actors in accordance with draft article 14 [11].

The requirement that offers of assistance be made "in accordance with the present draft articles" implies, among other consequences, that such offers should be made consistent with the principles set forth in these draft articles, in particular in draft article 7 [6].

(3) Offers of assistance which are consistent with the present draft articles cannot be regarded as interference in the affected State's internal affairs. This conclusion accords with the statement of the Institute of International Law in its 1989 resolution on the protection of human rights and the principle of non-intervention in internal affairs of States:

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[400] See, e.g., Tampere Convention, article 4 (2) ("A State Party requesting telecommunication assistance shall specify the scope and type of assistance required.").

> "An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened, cannot be considered an unlawful intervention in the internal affairs of that State. […]"[401]

(4) Draft article 16 [12] addresses the question of offers of assistance to affected States made by third actors by mentioning in two separate sentences those most likely to be involved in such offers after the occurrence of a disaster. States, the United Nations and other competent intergovernmental organizations are listed in the first sentence while the second concerns non-governmental organizations. The Commission decided to use a different wording in each of the two sentences. In the first sentence it opted for the phrasing "have the right to offer assistance" for reasons of emphasis. States, the United Nations and intergovernmental organizations not only are entitled but are also encouraged to make offers of assistance to the affected State. When referring to non-governmental organizations in the second sentence, the Commission adopted instead the wording "may also offer assistance" to stress the distinction, in terms of nature and legal status, that exists between the position of those organizations and that of States and intergovernmental organizations.

(5) The second sentence of draft article 16 [12] recognizes the important role played by those non-governmental organizations which, because of their nature, location and expertise, are well placed to provide assistance in response to a particular disaster. The position of non-governmental, and other, actors in carrying out relief operations is not a novelty in international law. The Geneva Conventions of 1949 already provided that, in situations of armed conflict:

> "[…] An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."[402]

Similarly, the Protocol II Additional to the Geneva Conventions provides that:

> "Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked."[403]

The important contribution of non-governmental organizations, working with strictly humanitarian motives, in disaster response was stressed by the General Assembly in its resolution 43/131 of 8 December 1988, entitled "Humanitarian assistance to victims of natural disasters and similar emergency situations", in which the Assembly, *inter alia*, invited all affected States to "facilitate the work of [such] organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential" and appealed "to all States to give their support to [those] organizations working to provide humanitarian assistance, where needed, to the victims of natural disasters and similar emergency situations".[404]

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[401] Art. 5.

[402] See, for example, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, art. 3 (2).

[403] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, art. 18 (1).

[404] See General Assembly resolution 43/131 of 8 December 1988, paras. 4–5.

### Article 17 [14]
### Facilitation of external assistance

**1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:**

**(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and**

**(b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.**

**2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.**

### Commentary

(1) Draft article 17 [14] addresses the facilitation of external assistance. Its purpose is to ensure that national law accommodates the provision of prompt and effective assistance. To that effect, it further requires the affected State to ensure that its relevant legislation and regulations are readily accessible to assisting actors.

(2) The draft article provides that affected States "shall take the necessary measures" to facilitate the prompt and effective provision of assistance. The phrase "take necessary measures, within its national law" may include, *inter alia*, legislative, executive or administrative measures. Measures may also include actions taken under emergency legislation, as well as permissible temporary adjustment or waiver of the applicability of particular national legislation or regulations, where appropriate. In formulating the draft article in such a manner, the Commission encourages States to allow for temporary non-applicability of their national laws in the event of disasters, and for appropriate provisions to be included within their national law so as to not create any legal uncertainty in the critical period following a disaster when such emergency provisions become necessary.

(3) The draft article outlines examples of areas of assistance in which national law should enable the taking of appropriate measures. The words "in particular" before the examples indicate that this is not an exhaustive list, but rather an illustration of the various areas that may need to be addressed by national law to facilitate prompt and effective assistance.

(4) Subparagraph (a) envisages relief personnel. Specific mention of both civilian and military relief personnel indicates the Commission's recognition that the military often plays a key role in disaster response actions. Military relief personnel are those involved in the provision of humanitarian assistance. The areas addressed in the subparagraph provide guidance as to how personnel can be better accommodated. Granting of privileges and immunities to assisting actors is an important measure included in many international agreements to encourage the help of foreign aid workers.[405] Waiver or expedition of visa and entry requirements and work permits is necessary to ensure prompt assistance.[406]

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[405] See, e.g., the Framework Convention on Civil Defence Assistance, art. 4 (5) ("The Beneficiary State shall, within the framework of national law, grant all privileges, immunities, and facilities necessary for carrying out the assistance.").

[406] The League of Red Cross Societies has long noted that entry requirements and visas serve as a "time-consuming procedure which often delays the dispatch of such delegates and teams," thus delaying the

Without a special regime in place, workers may be held up at borders or unable to work legally during the critical days after a disaster, or forced to exit and re-enter continually so as not to overstay their visas. Freedom of movement means the ability of workers to move freely within a disaster area in order to properly perform their specifically agreed upon functions.[407] Affected States can restrict access to certain sensitive areas while still allowing for freedom within the area concerned. Unnecessary restriction of movement of relief personnel inhibits workers' ability to provide flexible assistance.

(5) Subparagraph (b) addresses equipment and goods, which encompasses any and all supplies, tools, machines, foodstuffs, medicines, and other objects necessary for relief operations. The Commission intends that this category also include search dogs, which are normally regarded as goods and equipment, rather than creating a separate category for animals. Goods and equipment are essential to the facilitation of effective assistance, and national laws must be flexible to address the needs of persons affected by disasters and to ensure prompt delivery. Custom requirements and tariffs, as well as taxation, should be waived or lessened in order to reduce costs and prevent delay of goods.[408] Equipment and goods that are delayed can quickly lose their usefulness, and normal procedures in place aiming at protecting the economic interests of a State can become an obstacle in connection with aid equipment that can save lives or provide needed relief.

(6) The second paragraph of the draft article requires that all relevant legislation and regulations are readily accessible to assisting actors. By using the words "readily accessible", what is required is ease of access to such laws without creating the burden on the affected State to physically provide this information separately to all assisting actors.

### Article 18
### Protection of relief personnel, equipment and goods

The affected State shall take the appropriate measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

### Commentary

(1) Draft article 18 establishes the obligation for the affected State to take the measures which would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods involved in the provision of external assistance. Taking into account the often chaotic situations arising from disasters, the security concerns for these individuals and objects might create obstacles for the carrying out of activities aimed at giving support to the victims, thus reducing the likelihood that their essential needs would be properly satisfied.

(2) This draft article, therefore, complements draft article 17 [14] in establishing a coherent set of obligations whereby the affected State is expected to perform a series of activities which are necessary in order to guarantee to assisting States and other assisting actors the possibility to deliver efficient and prompt assistance. Nevertheless, the two

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vital assistance the affected State has a duty to provide. Resolution adopted by the League of Red Cross Societies Board of Governors at its 33rd session, Geneva, 28 October–1 November, 1975.

[407] See *Model Rules for Disaster Relief Operations*, 1982, United Nations Institute for Training and Research, Policy and Efficacy Studies No. 8 (Sales No. E.82.XV.PE/8), annex A, rule 16, which states that an affected State must permit assisting "personnel freedom of access to, and freedom of movement within, disaster stricken areas that are necessary for the performance of their specifically agreed functions."

[408] This is stressed in various international treaties. See, for example, Tampere Convention, art. 9 (4); see also ASEAN Agreement, art. 14 (b).

provisions have a somewhat different focus and approach. Draft article 17 [14] highlights the need for the affected State to establish a domestic legal order capable of facilitating the external assistance, mainly through the adoption of a series of legislative and regulatory actions. On the other hand, the question of the protection of relief personnel and their equipment and goods has traditionally — and for compelling policy reasons owing to its nature and the kind of measures to be adopted — been dealt with as a distinct matter, deserving of its own separate treatment, as the present draft article does.

(3) The measures to be adopted by the affected State may vary in content and can imply different forms of State conduct due to the context-driven nature of the obligation concerned. In particular, the flexibility inherent in the concept of "appropriate measures" suggests that the affected State may assume different obligations depending on the actors involved in potential threats to relief personnel, equipment and goods.

(4) A preliminary requirement for the affected State is to prevent its organs from adversely affecting relief activities. In this case, the obligation is one of result, with a clear content that imposes the duty on the affected State not to cause harm to the personnel, equipment and goods involved in external assistance through acts carried out by its organs.

(5) Secondly, draft article 18 contemplates a series of measures to be adopted to prevent detrimental activities caused by non-State actors aimed, for instance, at profiting from the volatile security conditions that may ensue from disasters in order to obtain illicit gains from criminal activities directed against disaster relief personnel, equipment and goods. In this respect, the draft article envisages an obligation of conduct instead of one of result. The affected State is not expected to succeed, whatever the circumstances, in preventing the commission of harmful acts but rather to endeavor to attain the objective sought by the relevant obligation. In particular, the wording "appropriate measures" allows a margin of discretion to the affected State in deciding what actions to take in this regard. It requires the State to act in a reasonably cautious and diligent manner by attempting to avoid the harmful events that may be caused by non-State actors. Measures to be taken by States in the realization of their best efforts to achieve the expected objective are context-dependent. Consequently, draft article 18 does not list the means to achieve the result aimed at, as this obligation can assume a dynamic character according to the evolving situation.

(6) Diverse circumstances might be relevant to evaluate the appropriateness of the measures to be taken in a disaster situation in implementation of this obligation. These include the difficulties that a State might encounter when attempting to perform its regular activities, due to the unruly situation created by the disaster and the extent of the resources at the disposal of the concerned State which might have been seriously affected by the disaster. Likewise, the security conditions prevailing in the relevant area of operations and the attitude and behavior of the humanitarian actors involved in relief operations, who might disregard the directive role attributed to the local authorities, thus increasing the possibility of their being faced with security risks. Furthermore, if harmful acts are directed against relief personnel, equipment and goods, the affected State shall address them by exercising its inherent competence to repress crimes committed within the area on which a disaster occurs.

(7) International humanitarian actors can themselves contribute to the realization of the goal sought by adopting, in their own planning and undertaking of operations, a series of mitigation measures geared to reducing their vulnerability to security threats. This may be achieved, for instance, through the elaboration of proper codes of conduct in this field, training activities and furnishing appropriate information about the conditions under which their staffs are called upon to operate and the standards of conduct they are required to meet. In any event, the adoption of such mitigating measures should not interfere with the taking of autonomous measures by the affected State.

(8) At the same time, it must be emphasized that security risks should be evaluated having in mind the character of relief missions and the need to guarantee to victims an adequate and effective response to a disaster. Draft article 18 should not be misinterpreted as entailing the creation of unreasonable and disproportionate hurdles for relief activities. As already emphasized with regard to draft article 17 [14], the measures that, based on security concerns, may be adopted to restrict the movement of relief personnel should not result in unnecessarily inhibiting the capacity of these actors to provide assistance to the victims of disasters.

(9) Similarly, the possibility of resorting to armed escorts in disaster relief operations to dispel safety concerns should be strictly assessed according to the best practices developed in this area by the main humanitarian actors. Particular attention is drawn to the 2013 Inter-Agency Standing Committee Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys,[409] which are designed to assist relevant actors in evaluating in an appropriate manner the taking of such a sensitive course of action. As explained in that document, humanitarian convoys will not, as a general rule, use armed escorts unless exceptional circumstances are present which make the use of armed escorts necessary. In order for the exception to be adopted, the consequences of and the possible alternatives to the use of armed escorts should be considered by the relevant actors, especially taking into account that the security concerns that may prevail in disaster situations are generally far less serious than those present in other scenarios.

(10) Draft article 18 provides protection for "relief personnel, equipment and goods", i.e. the pertinent persons and objects qualified as such in draft article 4, subparagraphs (e) and (f), and involved in providing external assistance. As emphasized in other provisions of the current draft articles, mainly draft articles 12 [9] and 14 [11], external assistance is contingent upon the consent of the affected State which has the primary role in the direction, control, coordination and supervision of such activities. Therefore, once the affected State has requested assistance or has accepted offers submitted by assisting States, it shall endeavor to guarantee the protection prescribed in draft article 18.

(11) Such a comprehensive approach is relevant for the proper fulfilment of the obligation enshrined in draft article 18. Domestic authorities are best placed to assure a proper safety framework for the performance of relief activities. In particular, they are requested to evaluate the security risks that might be incurred by international relief personnel, to cooperate with them in dealing with safety issues and to coordinate the activities of external actors, taking into account those concerns.

(12) In accordance with draft article 4, subparagraph (e), the relief personnel that would potentially benefit from draft article 18 may belong to either the civilian or military personnel sent, as the case may be, by an assisting State, competent intergovernmental organization, relevant non-governmental organization or any other entity external to the affected State, providing assistance to that State at its request or with its consent. All these categories are, thus, pertinent regarding the application of draft article 18. The reference to the term "external assistance" reflects the position, also affirmed in the commentary to draft article 15 [13],[410] that the draft articles only regulate the activities of actors which are external to the affected State.

(13) Equipment and goods, as defined in draft article 4, subparagraph (f), relating to the activities of relief personnel, likewise benefit from the application of draft article 18. Being at the disposal of assisting States or other assisting actors, equipment and goods will be

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[409] 27 February 2013.

[410] See below para. (2) of the commentary to draft art. 15 [13].

covered by the application of draft article 18 independently from their origin. These objects could also be directly acquired in the domestic market of the affected State. The wording "present in its territory" is intended to clarify this aspect.

### Article 19 [15]
### Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actor wishing to terminate shall provide appropriate notification.

### Commentary

(1) Draft article 19 [15] deals with the question of termination of external assistance. The provision is comprised of two sentences. The first sentence concerns the requirement that the affected State, the assisting State and, as appropriate, other assisting actors consult each other as regards the termination of the external assistance, including the modalities of such termination. The second sentence sets out the requirement that parties wishing to terminate assistance provide appropriate notification.

(2) When an affected State accepts an offer of assistance, it retains control over the duration for which that assistance will be provided. Draft article 12 [9], paragraph 2, explicitly recognizes that the affected State has the primary role in the direction, control, coordination and supervision of disaster relief and assistance on its territory. For its part, draft article 14 [11] requires the consent of the affected State to external assistance, with the caveat that consent shall not be withheld arbitrarily. The combined import of the foregoing provisions is that the affected State can withdraw consent, thereby terminating external assistance and bringing to an end the legal regime under which the assistance was being provided.

(3) Draft article 19 [15] seeks to strike a balance between the right of the affected State to terminate external assistance and the position of assisting actors, with a view to providing adequate protection to persons affected by disasters. Accordingly, the provision does not recognize the right of only the affected State to unilaterally terminate assistance. Instead, the Commission acknowledges that assisting States and other assisting actors may themselves need to terminate their assistance activities. Draft article 19 [15] thus preserves the right of any party to terminate the assistance being provided, on the understanding that this is done in consultation with the other assisting States or assisting actors, as appropriate.

(4) The words "other assisting actors" are drawn from existing instruments[411] to describe international organizations and non-governmental organizations which provide disaster relief and assistance, and are defined in draft article 4 on the use of terms. Draft article 19 [15] is drafted in bilateral terms, but it does not exclude the scenario of multiple assisting actors providing external assistance.

(5) The requirement to consult reflects the spirit of solidarity and cooperation implicit throughout the draft articles, and the principle of cooperation enshrined in draft articles 8 [5], 9 [5 *bis*] and 10 [5 *ter*]. The Commission anticipates that termination may become necessary for a variety of reasons and at different stages during the provision of assistance. The relief operations may reach a stage where it would be only logical either for the affected State or one or more of the assisting parties to cease operations. Circumstances leading to termination may include instances in which the resources of an assisting State or

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[411] IFRC Guidelines, 2007, art. 12, and annotations thereto.

other assisting actor are depleted, or where the occurrence of another disaster makes the diversion of resources necessary. Draft article 19 [15] is flexible, allowing for the adjustment of the duration of assistance according to the circumstances, while implying that parties should consult in good faith. In any event, draft article 19 [15] should be read in light of the purpose of the draft articles, as indicated in draft article 2 [2]; thus, decisions regarding the termination of assistance are to be made taking into consideration the needs of the persons affected by disaster, namely, whether and how far such needs have been met.

(6) The word "modalities" refers to the procedures to be followed in terminating assistance. Even though termination on a mutual basis may not always be feasible, consultation in relation to the modalities would enable the relevant parties to facilitate an amicable and efficient termination.

(7) The second sentence establishes a requirement of notification by the party wishing to terminate external assistance. Appropriate notification is necessary to ensure a degree of stability in the situation, so that no party is adversely affected by an abrupt termination of assistance. The provision is drafted flexibly so as to anticipate notification before, during or after the consultation process. No procedural constraints have been placed on the notification process. However, notification should be "appropriate" according to the circumstances, including the form and timing, preferably early, of the notification.

### Article 20
### Relationship to special or other rules of international law

The present draft articles are without prejudice to special or other rules of international law applicable in the event of disasters.

#### Commentary

(1) Draft article 20 deals with the relationship between the draft articles and special or other rules of international law. It seeks to clarify the way in which the draft articles interact with certain rules of international law which either deal with the same subject matter of the draft articles or are not directly concerned with disasters but would nonetheless apply in situations covered by the draft articles.

(2) The rationale behind the reference to "special rules" is to clarify that treaties or other rules of international law that set out obligations having a higher degree of specificity than the present draft articles are not displaced by them. This approach reflects the *lex specialis* principle and aims at safeguarding the continued application of the dense web of existing obligations regarding matters covered by the present draft articles.

(3) The draft article is meant to cover different forms of special rules. The latter include more detailed rules enshrined in treaties whose scope *ratione materiae* falls within that of the present draft articles (for example regional or bilateral treaties on mutual assistance in case of disasters), as well as those included in treaties devoted to other matters but which contain specific rules addressing disaster situations (for example Article F, Section 5 of the Annex to the 1965 Convention on Facilitation of International Maritime Traffic).

(4) This approach also accords with the position taken by the Commission in draft article 21 [4] which concerns the applicability of the draft articles in situations of armed conflict. While it is accepted that in such situations the rules of international humanitarian law should be given precedence over those contained in the present draft articles, these would continue to apply "to the extent" that some legal issues raised by a disaster which occurred in the same area as an armed conflict would not be covered by the rules of international humanitarian law. In this manner the present draft articles will contribute to filling possible legal gaps in the protection of persons affected by disasters occurring during an armed conflict.

(5) The reference to "other rules" deals with the interaction between the present draft articles and rules of international law which are not directly concerned with disasters, but which nonetheless may be applied in the event of disasters. Examples would be provisions concerning the law of treaties — in particular, those related to supervening impossibility of performance and fundamental change of circumstances — as well as the rules on the responsibility of States and international organizations, and the responsibility of individuals. The provision confirms that also this category of rules is not displaced by the present draft articles, thus complementing the *lex specialis* principle stated in the first part of the draft article.

(6) The without prejudice clause in draft article 20 also applies to the rules of customary international law. In fact, the draft articles do not cover all the issues which may be relevant in the event of disasters. Moreover, the draft articles do not intend to preclude the further development of rules of customary international law in this field. The draft article is inspired by the preambular paragraph of the Vienna Convention on the Law of Treaties of 1969, which states that: "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention".

(7) In addition, it should be borne in mind that rules of general application not directly concerned with disasters might also be contained in treaty law. The Commission therefore considered that the wording "other rules of international law" was the most appropriate to indicate all rules of international law that might interact with the draft articles, for it expresses the idea that the without prejudice clause in draft article 20 applies to all categories of international law rules.

### Article 21 [4]
### Relationship to international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

**Commentary**

(1) Draft article 21 [4] deals with the relationship of the draft articles with international humanitarian law, and, accordingly, the extent to which the draft articles cover situations of armed conflict, which can have an equally calamitous impact on the functioning of societies. The provision is formulated in a manner intended to clarify the relationship by giving precedence to the rules of international humanitarian law in situations where they are applicable.

(2) The Commission considered including an express exclusion of the applicability of the draft articles in situations of armed conflict as a further element in the definition of "disaster" (draft article 3 [3]), so as to avoid any interpretation that, for purposes of the draft articles, armed conflict would be covered to the extent that the threshold criteria in draft article 3 [3] were satisfied. Such approach was not followed since a categorical exclusion could be counterproductive, particularly in situations of "complex emergencies" where a disaster occurs in an area where there is an armed conflict. A blank exclusion of the applicability of the draft articles because of the coexistence of an armed conflict would be detrimental to the protection of the persons affected by the disaster, especially when the onset of the disaster pre-dated the armed conflict.

(3) The Commission also initially considered rendering the provision as a more straightforward "without prejudice" clause, as is done in draft article 20, merely preserving the applicability of both sets of rules, and thereby suggesting that the draft articles applied in the context of armed conflict to the same extent as existing rules of international law. Instead, the Commission settled for addressing the matter in terms of the relationship between the draft articles and international humanitarian law. While the draft articles do not

**seek to regulate the consequences of armed conflict, they can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply.**

# Chapter VI
# The obligation to extradite or prosecute (*aut dedere aut judicare*)

## A. Introduction

57. The Commission, at its fifty-seventh session (2005), decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur.[412]

58. The Special Rapporteur submitted four reports. The Commission received and considered the preliminary report at its fifty-eighth session (2006), the second report at its fifty-ninth session (2007), the third report at its sixtieth session (2008) and the fourth report at its sixty-third session (2011).[413]

59. At the sixty-first session (2009), an open-ended Working Group was established under the chairmanship of Mr. Alain Pellet,[414] and from its discussions, a proposed general framework for consideration of the topic, specifying the issues to be addressed by the Special Rapporteur, was prepared.[415] At the sixty-second session (2010), the Working Group was reconstituted and, in the absence of its Chairman, was chaired by Mr. Enrique Candioti.[416] The Working Group had before it the Survey of multilateral conventions which might be of relevance for the topic prepared by the Secretariat (A/CN.4/630).

60. At the sixty-fourth (2012) and sixty-fifth (2013) sessions, the Commission established an open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), under the chairmanship of Mr. Kriangsak Kittichaisaree, to undertake an evaluation of the progress of work on the topic in the Commission, particularly in the light of the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, of 20 July 2012,[417] and to explore possible future options to be taken by the Commission.[418]

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[412] At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500). The General Assembly, in paragraph 5 of resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission at its fifty-sixth session (2004), on the basis of the proposal annexed to that year's report (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362–363).

[413] A/CN.4/571 (preliminary report); A/CN.4/585 and Corr.1 (second report); A/CN.4/603 (third report); and A/CN.4/648 (fourth report).

[414] During its sixtieth session, at its 2988th meeting on 31 July 2008, the Commission decided to establish a working group on the topic under the chairmanship of Mr. Alain Pellet, with a mandate and membership to be determined at the sixty-first session (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 315).

[415] For the proposed general framework prepared by the Working Group, see *ibid.*, *Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 204.

[416] At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the temporary Chairman of the Working Group (*ibid.*, *Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 337–340).

[417] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

[418] At its 3152nd meeting, on 30 July 2012, the Commission took note of the oral report of the Chairman of the Working Group (*Official Records of the General Assembly.*, *Sixty-seventh Session, Supplement*

## B. Consideration of the topic at the present session

61. At the present session, the Commission constituted a Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairmanship of Mr. Kriangsak Kittichaisaree. The Working Group continued to evaluate work on this topic, particularly in the light of comments made in the Sixth Committee at the sixty-eighth session of the General Assembly on the 2013 report of the Working Group.[419] The Working Group held 2 meetings, on 6 May and 4 June 2014.

62. The Working Group considered several options for the Commission in deciding how to proceed with its remaining work on the topic. After careful consideration, the Working Group deemed it appropriate that the Commission expedite its work on the topic and produce an outcome that was of practical value to the international community. The 2013 report constituted the basis of the final report of the Working Group. The Working Group also discussed the issues that were partially or not covered by its 2013 report but were subsequently raised in the Sixth Committee during the sixty-eighth session of the General Assembly, namely: gaps in the existing conventional regime; the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; the customary international law status of the obligation to extradite or prosecute; and other matters of continued relevance in the 2009 General Framework. The Working Group's consideration of the above issues exhausted all the issues remaining to be analysed in relation to the topic.

63. At its 3217th meeting, on 7 July 2014, the Commission took note of report of the Working Group (A/CN. 4/L.844), which, *inter alia*, contained the recommendation that the Commission: (a) adopt the 2013 and 2014 reports, which provide useful guidance for States; and (b) conclude its consideration of the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)".

64. At its 3242nd meeting, on 7 August 2014, the Commission adopted the final report on the topic, "Obligation to extradite or prosecute (*aut dedere aut judicare*)" (see sect. C, below) and decided to conclude its consideration of the topic. It also expressed its deep appreciation to the Chairman of the Working Group, Mr. Kriangsak Kittichaisaree, for his very valuable contribution and the work done in an efficient and expeditious manner. The Commission also recalled, with gratitude, the work of the former Special Rapporteur on the topic, Mr. Zdzislaw Galicki.

## C. Final report on the topic

65. This report is intended to summarize and to highlight particular aspects of the work of the Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", in order to assist States in this matter.

### 1. Obligation to fight impunity in accordance with the rule of law

(1) The Commission notes that States have expressed their desire to cooperate among themselves, and with competent international tribunals, in the fight against impunity for

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*No. 10* (A/67/10), paras. 208–221) and at its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Working Group (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 149).

[419] *Ibid.*, *Sixty-eighth Session*, Supplement 10 (A/68/10), annex A.

crimes, in particular offences of international concern,[420] and in accordance with the rule of law.[421] In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, the Heads of State and Government and heads of delegation attending the meeting on 24 September 2012 committed themselves to "ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law ...".[422] The obligation to cooperate in combating such impunity is given effect in numerous conventions, *inter alia*, through the obligation to extradite or prosecute.[423] The view that the obligation to extradite or prosecute plays a crucial role in the fight against impunity is widely shared by States;[424] the obligation applies in respect of a wide range of crimes of serious concern to the international community and has been included in all sectoral conventions against international terrorism concluded since 1970.

(2) The role the obligation to extradite or prosecute plays in supporting international cooperation to fight impunity has been recognized at least since the time of Hugo Grotius, who postulated the principle of *aut dedere aut punire* (either extradite or punish): "When appealed to, a State should either punish the guilty person as he deserves, or it should

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[420] See, e.g., General Assembly resolution 2840 (XXVI) of 18 December 1971 entitled "Question of the punishment of war criminals and of persons who have committed crimes against humanity"; General Assembly resolution 3074 (XXVIII) of 3 December 1973 on the "Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity"; and principle 18 of Economic and Social Council resolution 1989/65 of 24 May 1989 entitled "Effective prevention and investigation of extra-legal, arbitrary and summary executions".

[421] General Assembly resolution 67/1 of 24 September 2012.

[422] *Ibid.*, para. 22.

[423] See Part 3 below. In the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice states: "... Extradition and prosecution are alternative ways to combat impunity in accordance with Art. 7, para 1 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984]. ...." (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 443, para. 50). The Court adds that the States parties to the Convention against Torture have "a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity" (*ibid.*, p. 449, para. 68). The Court reiterates that the object and purpose of the Convention are "to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts" (*ibid.*, p. 451, para. 74 and cf. also para. 75).

Special Rapporteur Zdzislaw Galicki's fourth report dealt at length with the issue of the duty to cooperate in the fight against impunity. He cited the following examples of international instruments which provide a legal basis for the duty to cooperate: Art. 1 (3) of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the preamble to the 1998 Rome Statute of the International Criminal Court, and guideline XII of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 Mar. 2011, A/CN.4/648, paras. 26–33.

[424] For example, Belgium (A/CN.4/612, para. 33); Denmark, Finland, Iceland, Norway and Sweden (A/C.6/66/SR.26, para. 10); Switzerland (*ibid.*, para. 18); El Salvador (*ibid.*, para. 24); Italy (*ibid.*, para. 42); Peru (*ibid.*, para. 64); Belarus (A/C.6/66/SR. 27, para. 41); Russian Federation (*ibid.*, para. 64); and India (*ibid.*, para. 81).

entrust him to the discretion of the party making the appeal."[425] The modern terminology replaces "punishment" with "prosecution" as the alternative to extradition in order to reflect better the possibility that an alleged offender may be found not guilty.

### 2. The importance of the obligation to extradite or prosecute in the work of the International Law Commission

(3) The topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" may be viewed as having been encompassed by the topic "Jurisdiction with regard to crimes committed outside national territory" which was on the provisional list of fourteen topics at the first session of the Commission in 1949.[426] It is also addressed in articles 8 (Establishment of jurisdiction) and 9 (Obligation to extradite or prosecute) of the 1996 Draft code of crimes against the peace and security of mankind. Article 9 of the Draft code stipulates an obligation to extradite or prosecute for genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.[427] The principle *aut dedere aut judicare* is said to have derived from "a number of multilateral conventions"[428] that contain the obligation. An analysis of the draft code's history suggests that draft article 9 is driven by the need for an effective system of criminalization and prosecution of the said core crimes, rather than actual State practice and *opinio juris*.[429] The article is justified on the basis of the grave nature of the crimes involved and the desire to combat impunity for individuals who commit these crimes.[430] While the draft code's focus is on core crimes,[431] the material scope of the obligation to extradite or prosecute covers most crimes of international concern, as mentioned in (1) above.

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[425] Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by Francis W. Kelsey (Oxford/London: Clarendon Press/Humphrey Milford, 1925), pp. 527–529 at 527).

[426] United Nations, *The Work of the International Law Commission*, Eighth edition (New York: United Nations 2012), vol. 1, p. 37.

[427] "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual". See also the Commission's commentary on this article (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. II).

[428] Draft code of crimes against the peace and security of mankind, art. 8, para. (3) (*ibid.*).

[429] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), p. 80, para. 142.

[430] Draft code of crimes against the peace and security of mankind, art. 8, paras. (3), (4) and (8) and art. 9, para. (2) (*ibid., Fifty-first Session, Supplement No. 10* (A/51/10)).

[431] At the first reading in 1991, the draft code comprised the following 12 crimes: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and wilful and severe damage to the environment. At its sessions in 1995 and 1996, the Commission reduced the number of crimes in the final draft code to four crimes: aggression; genocide; war crimes; and crimes against humanity, adhering to the Nuremberg legacy as the criterion for the choice of the crimes covered by the draft code. The primary reason for this approach appeared to have been the unfavourable comments by 24 Governments to the list of 12 crimes proposed in 1991. A fifth crime, crimes against United Nations and associated personnel, was added at the last moment on the basis of its magnitude, the seriousness of the problem of attacks on such personnel and "its centrality to the maintenance of international peace and security" (A/CN.4/448 and Add.1).

The crime of aggression was not subject to the provision of art. 9 of the draft code. In the Commission's opinion, "[t]he determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of

### 3. Summary of work

(4) The following summarizes several key aspects of the Commission's work on this topic. In the past, some members of the Commission, including Special Rapporteur Zdzislaw Galicki, doubted the use of the Latin formula "*aut dedere aut judicare*", especially in relation to the term "*judicare*", which they considered as not reflecting precisely the scope of the term "prosecute". However, the Special Rapporteur considered it premature at that time to focus on the precise definition of terms, leaving them to be defined in a future draft article on "Use of terms".[432] The report of the Commission decided to proceed on the understanding that whether the mandatory nature of "extradition" or that of "prosecution" has priority over the other depends on the context and applicable legal regime in particular situations.

(5) The Commission considered useful to its work a wide range of materials, particularly: the Survey of multilateral conventions which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" conducted by Secretariat[433] (hereinafter "Secretariat's Survey (2010)"), which identified multilateral instruments at the universal and regional levels that contain provisions combining extradition and prosecution as alternatives for the punishment of offenders; and the Judgment of 20 July 2012 of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

### (a) Typology of provisions in multilateral instruments

(6) The Secretariat's Survey (2010) proposed a description and a typology of the relevant instruments in light of these provisions, and examined the preparatory work of certain key conventions that had served as models in the field. For some provisions, it also reviewed any reservations made. It pointed out the differences and similarities between the reviewed provisions in different conventions and their evolution, and offered overall conclusions as to: (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions. The Survey classified conventions that included such provisions into four categories: (a) the 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model; (b) regional conventions on extradition; (c) the 1949 Geneva Conventions and the 1977 Additional Protocol I; and (d) the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions that have followed the same model.

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international law *par in parent imperium non habet*. … [and] the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security." (Draft code of crimes against the peace and security of mankind, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 30, para. 14).

[432] A/CN.4/603, paras. 36–37. In his preliminary report, the Special Rapporteur discussed various Latin formulas relevant to this topic; namely: *aut dedere aut punire*; *judicare aut dedere*; *aut dedere aut prosequi*; *aut dedere, aut judicare, aut tergiversari*; and *aut dedere aut poenam persequi* (A/CN.4/571, paras. 5–8). See also: Raphäel van Steenberghe, "The Obligation to Extradite or Prosecute: Clarifying its Nature" (*Journal of International Criminal Justice*, vol. 9 (2011), p. 1089 at pp. 1107–8, on the formulas *aut dedere aut punire*, *aut dedere aut prosequi*, and *aut dedere aut judicare*.

[433] A/CN.4/630.

(7) The 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model[434] typically: (a) criminalize the relevant offence, which the States parties undertake to make punishable under their domestic laws; (b) make provision for prosecution and extradition which take into account the divergent views of States with regard to the extradition of nationals and the exercise of extraterritorial jurisdiction, the latter being permissive rather than compulsory; (c) contain provisions which impose an obligation to extradite, with prosecution coming into play once there is a refusal of extradition; (d) establish an extradition regime by which States undertake, under certain conditions, to consider the offence as extraditable; (e) contain a provision providing that a State's attitude on the general issue of criminal jurisdiction as a question of international law was not affected by its participation in the Convention; and (f) contain a non-prejudice clause with regard to each State's criminal legislation and administration. While some of the instruments under this model contain terminological differences of an editorial nature, others modify the substance of the obligations undertaken by States Parties.

(8) Numerous regional conventions and arrangements on extradition also contain provisions that combine options of extradition and prosecution,[435] although those instruments typically emphasize the obligation to extradite (which is regulated in detail) and only contemplate submission to prosecution as an alternative to avoid impunity in the context of that cooperation. Under that model, extradition is a means to ensure the effectiveness of criminal jurisdiction. States parties have a general duty to extradite unless the request fits within a condition or exception, including mandatory and discretionary grounds for refusal. For instance, extradition of nationals could be prohibited or subject to specific safeguards. Provisions in subsequent agreements and arrangements have been subject to modification and adjustment over time, particularly in respect of conditions and exceptions.[436]

(9) The four Geneva Conventions of 1949 contain the same provision whereby each High Contracting Party is obligated to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and to bring such persons, regardless of their nationality, before its own courts. However, it may also, if it prefers, and in accordance with its domestic legislation, hand such persons over for trial to another High Contracting

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[434] E.g., (a) 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs; (b) the 1937 Convention for the Prevention and Punishment of Terrorism; (c) the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; (d) the 1961 Single Convention on Narcotic Drugs; and (e) the 1971 Convention on Psychotropic Substances.

[435] These instruments include: (a) the 1928 Convention on Private International Law, also known as the "Bustamante Code", under Book IV (International Law of Procedure), Title III (Extradition); (b) the 1933 Convention on Extradition; (c) the 1981 Inter-American Convention on Extradition; (d) the 1957 European Convention on Extradition; (e) the 1961 General Convention on Judicial Cooperation (*Convention générale de coopération en matière de justice*); (f) the 1994 Economic Community of West African States (ECOWAS) Convention on Extradition; and (g) the London Scheme for Extradition within the Commonwealth.

[436] It may also be recalled that General Assembly has adopted the Model Treaty on Extradition (resolution 45/116, annex) and the Model Treaty on Mutual Assistance in Criminal Matters (resolution 45/117). See also the 2004 *Model Law on Extradition* prepared by the United Nations Office on Drugs and Crime, Available at http://www.unodc.org/pdf/model_law_extradition.pdf. See also Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, available at: http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf (visited on 3 June 2014).

Party concerned, provided that the latter has established a *prima facie* case.[437] Therefore, under that model, the obligation to search for and submit to prosecution an alleged offender is not conditional on any jurisdictional consideration and that obligation exists irrespective of any request for extradition by another party.[438] Nonetheless, extradition is an available option subject to a condition that the prosecuting State has established a *prima facie* case. That mechanism is made applicable to Additional Protocol I of 1977 by renvoi.[439]

(10) The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, stipulates in article 7 that "[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution". This "Hague formula" is a variation of the Geneva Conventions formula and has served as a model for several subsequent conventions aimed at the suppression of specific offences, principally in the fight against terrorism, but also in many other areas (including torture, mercenarism, crimes against United Nations and associated personnel, transnational crime, corruption, and enforced disappearance).[440] However, many of those subsequent instruments have modified

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[437] Arts. 49, 50, 129, and 146, respectively, of the First, Second, Third, and Fourth Geneva Conventions. The reason these Geneva Conventions use the term "hand over" instead of "extradite" is explained in the Secretariat's Survey (2010) at para. 54.

According to Claus Kreβ ("Reflection on the *Iudicare* Limb of the Grave Breaches Regime" *Journal of International Criminal Justice*, vol. 7 (2009), p. 789), what the *judicare* limb of the grave breaches regime actually entails is a duty to investigate and, where so warranted, to prosecute and convict.

[438] See Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV (International Committee of the Red Cross 1958) p. 593.

[439] Art. 85 (1), (3) and art. 88 (2) of Additional Protocol I of 1977.

[440] These include, *inter alia*,: (a) the 1971 Organization of American States (OAS) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance; (b) the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (c) the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; (d) the 1977 European Convention on the Suppression of Terrorism; (e) 1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa; (f) the 1979 International Convention against the Taking of Hostages; (g) the 1979 Convention on the Physical Protection of Nuclear Material; (h) the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (i) the 1985 Inter-American Convention to Prevent and Punish Torture; (j) the 1987 South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism and the 2004 Additional Protocol thereto; (k) the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (l) the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; (m) the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; (n) the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries; (o) the 1994 Inter-American Convention on the Forced Disappearance of Persons; (p) the 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Optional Protocol; (q) the 1996 Inter-American Convention against Corruption; (r) the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; (s) the 1997 Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; (t) the 1997 International Convention for the Suppression of Terrorist Bombings; (u) the 1998 Convention on the Protection of the Environment through Criminal Law; (v) the 1999 Criminal Law Convention on Corruption; (w) the 1999 Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict; (x) the 1999 International Convention for the Suppression of the Financing of Terrorism; (y) the 2000

the original terminology which sometimes affect the substance of the obligations contained in the Hague formula.

(11) In his Separate Opinion in the Judgment of 20 July 2012 of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judge Yusuf also addressed the typology of "treaties containing the formula *aut dedere aut judicare*" and divided them into two broad categories.[441] The first category of international conventions contained clauses which impose an obligation to extradite, and in which submission to prosecution becomes an obligation only after the refusal of extradition. Those conventions are structured in such a way that gives priority to extradition to the State in whose territory the crime is committed. The majority of those conventions do not impose any general obligation on States parties to submit to prosecution the alleged offender, and such submission by the State on whose territory the alleged offender is present becomes an obligation only if a request for extradition has been refused, or some factors such as nationality of the alleged offender exist. Examples of the first category are article 9, paragraph 22 of the 1929 International Convention for the Suppression of Counterfeiting Currency, article 15 of the African Union Convention on Preventing and Combating Corruption, and article 5 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

The second category of international conventions contains clauses which impose an obligation to submit to prosecution, with extradition being an available option, as well as clauses which impose an obligation to submit to prosecution, with extradition becoming an obligation if the State fails to do so. Such clauses in that category can be found in, for example, the relevant provisions of the four Geneva Conventions of 1949, article 7, paragraph 1 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, and article 7, paragraph 1 of the Convention against Torture.

(12) In light of the above, the Commission considers that when drafting treaties, States can decide for themselves which conventional formula on the obligation to extradite or prosecute best suits their objective in a particular circumstance. Owing to the great diversity in the formulation, content, and scope of the obligation to extradite or prosecute in

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Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; (z) the 2000 United Nations Convention against Transnational Organized Crime and its Protocols; (aa) the 2001 Council of Europe Convention on Cybercrime; (bb) the 2003 African Union Convention on Preventing and Combating Corruption; (cc) the 2003 United Nations Convention against Corruption; (dd) the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; (ee) the 2005 Council of Europe Convention on the Prevention of Terrorism; (ff) the 2006 International Convention for the Protection of All Persons from Enforced Disappearance; (gg) the 2007 Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism; (hh) 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; and (ii) the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.

[441] Separate Opinion of Judge Yusuf in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 567–568, paras. 19–22. See also Secretariat survey (2010), para. 126. Cf. also Belgium's comments submitted to the Commission in 2009, where Belgium identified two types of treaties: (a) treaties which contain an *aut dedere aut judicare* clause with the obligation to prosecute conditional on refusal of a request for extradition of the alleged perpetrator of an offence; and (b) treaties which contain a *judicare vel dedere* clause with the obligation on States to exercise universal jurisdiction over perpetrators of the offences under the treaties, without making this obligation conditional on refusal to honour a prior extradition request (A/CN.4/612, para. 15), quoted by Special Rapporteur Galicki in his fourth report (A/CN.4/648, para. 85 and fn. 56).

conventional practice, it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute.[442]

(13) Although the Commission finds that the scope of the obligation to extradite or prosecute under the relevant conventions should be analysed on a case-by-case basis, it acknowledges that there may be some general trends and common features in the more recent conventions containing the obligation to extradite or prosecute. One of the most relevant trends appears to be the use of "Hague formula" that serves "as a model for most of the contemporary conventions for the suppression of specific offences".[443] Of the conventions drafted on or after 1970, approximately three-quarters follow the "Hague formula". In those post-1970 conventions, there is a common trend that the custodial State shall, without exception, submit the case of the alleged offender to a competent authority if it does not extradite. Such obligation is supplemented by additional provisions that require States parties: (a) to criminalize the relevant offence under its domestic laws; (b) to establish jurisdiction over the offence when there is a link to the crime or when the alleged offender is present on their territory and is not extradited; (c) to make provisions to ensure that the alleged offender is under custody and there is a preliminary enquiry; and (d) to treat the offence as extraditable.[444] In particular, under the prosecution limb of the obligation, the conventions only emphasize that the case be submitted to a competent authority for the purpose of prosecution. To a lesser extent, there is also a trend of stipulating that, absent prosecution by the custodial State, the alleged offender must be extradited without exception whatsoever.

(14) The Commission observes that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in relation to most crimes against humanity,[445] war crimes other than grave breaches, and war crimes in non-international armed conflict.[446] In relation to genocide, the international cooperation regime

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[442] As the Secretariat's Survey (2010) concludes (A/CN.4/630, para. 153):

"… The examination of conventional practice in this field shows that the degree of specificity of the various conventions in regulating these issues varies considerably, and that there exist very few conventions that adopt identical mechanisms for the punishment of offenders (including with respect to the relationship between extradition and prosecution). The variation in the provisions relating to prosecution and extradition appears to be determined by several factors, including the geographical, institutional and thematic framework in which each convention is negotiated … and the development of related areas of international law, such as human rights and criminal justice. It follows that, while it is possible to identify some general trends and common features in the relevant provisions, conclusive findings regarding the precise scope of each provision need to be made on a case-by-case basis, taking into account the formulation of the provision, the general economy of the treaty in which it is contained and the relevant preparatory works."

[443] *Ibid.*, para. 91.

[444] *Ibid.*, para. 109.

[445] The 2006 International Convention for the Protection of All Persons from Enforced Disappearance follows the Hague formula, and refers to the "extreme seriousness" of the offence, which it qualifies, when widespread or systematic, as a crime against humanity. However, outside of this, there appears to be a lack of international conventions with the obligation to extradite or prosecute in relation to crimes against humanity.

[446] The underlying principle of the four Geneva Conventions of 1949 is the establishment of universal jurisdiction over grave breaches of the Conventions. Each Convention contains an article describing what acts constitute grave breaches that follows immediately after the extradite-or-prosecute provision.

For the First and Second Geneva Conventions, this article is identical (arts. 50 and 51, respectively): "Grave breaches to which the preceding Article relates shall be those involving any of the following could be strengthened beyond the rudimentary regime under the Convention for the Prevention and Punishment of the Crime of Genocide of 1948. As explained by the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, article VI of the Genocide Convention only obligates Contracting Parties to institute and exercise territorial criminal jurisdiction as well as to cooperate with an "international penal tribunal" under certain circumstances.[447]

### (b) Implementation of the obligation to extradite or prosecute

(15) *The Hague formula*. The Commission views the Judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* to be helpful in elucidating some aspects relevant to the implementation of the obligation to extradite or prosecute. The Judgment confines itself to an analysis of the mechanism to combat impunity under the Convention against Torture. In particular, the Judgment focuses on the relationship between the different articles on the establishment of jurisdiction (article 5), the obligation to engage in a preliminary inquiry (article 6), and the obligation to prosecute or extradite (article 7).[448] While the Court's reasoning relates to the specific implementation and application of issues surrounding that Convention, since the relevant prosecute-or-extradite provisions of the Convention against

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acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

Art. 130 of the Third Geneva Convention stipulates: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

Art. 147 of the Fourth Geneva Convention provides: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

The four Conventions and the Additional Protocol I of 1977 do not establish an obligation to extradite or prosecute outside of grave breaches. No other international instruments relating to war crimes have this obligation, either.

[447] *I.C.J. Reports 2007*, p. 43, at pp. 226–227 and 229, paras. 442, 449. Art. VI reads: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." The Court at para. 442 did not exclude other bases when it observed that "Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so."

[448] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 450–461, paras. 71–121.

Torture are modelled upon those of the "Hague formula", the Court's ruling may also help to elucidate the meaning of the prosecute-or-extradite regime under the 1970 Hague Convention and other conventions which have followed the same formula.[449] As the Court also holds that the prohibition of torture is a peremptory norm (*jus cogens*),[450] the prosecute-or-extradite formula under the Convention against Torture could serve as a model for new prosecute-or-extradite regimes governing prohibitions covered by peremptory norms (*jus cogens*), such as genocide, crimes against humanity, and serious war crimes.

(16) The Court determines that States parties to the Convention against Torture have obligations to criminalize torture, establish their jurisdiction over the crime of torture so as to equip themselves with the necessary legal tool to prosecute that offence, and make an inquiry into the facts immediately from the time the suspect is present in their respective territories. The Court declares: "These obligations, taken as a whole, might be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven".[451] The obligation under article 7, paragraph 1, "to submit the case to the competent authorities for the purpose of prosecution", which the Court calls the "obligation to prosecute", arises regardless of the existence of a prior request for the extradition of the suspect. However, national authorities are left to decide whether to initiate proceedings in light of the evidence before them and the relevant rules of criminal procedure.[452] In particular, the Court rules that "[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State".[453] The Court also notes that both the 1970 Hague Convention and the Convention against Torture emphasize "that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned".[454]

(17) *Basic elements of the obligation to extradite or prosecute to be included in national legislation*. The effective fulfilment of the obligation to extradite or prosecute requires undertaking necessary national measures to criminalize the relevant offences, establishing jurisdiction over the offences and the person present in the territory of the State, investigating or undertaking primary inquiry, apprehending the suspect, and submitting the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extrading, if an extradition request is made by another State with the necessary jurisdiction and capability to prosecute the suspect.

(18) *Establishment of the necessary jurisdiction*. Establishing jurisdiction is "a logical prior step" to the implementation of an obligation to extradite or prosecute an alleged

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[449] The Court notes that art. 7 (1) of the Convention against Torture is based on a similar provision contained in the 1970 Hague Convention (*ibid.*, para. 90). As Judge Donoghue puts it: "The dispositive paragraphs of today's Judgment bind only the Parties. Nonetheless, the Court's interpretation of a multilateral treaty (or of customary international law) can have implications for other States. The far-reaching nature of the legal issues presented by this case is revealed by the number of questions posed by Members of the Court during oral proceedings. ...." (Declaration of Judge Donoghue in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 590, para. 21.)

[450] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 457, para. 99.

[451] *Ibid.*, p. 455, para. 91. See also pp. 451–452 and 456, paras. 74–75, 78, 94.

[452] *Ibid.*, pp. 454–456, paras. 90, 94.

[453] *Ibid.*, p. 456, para. 95.

[454] Art. 7, para. 2 of the Convention against Torture and art. 7 of the Hague Convention of 1970, *ibid.* para. 90.

offender present in the territory of a State.[455] For the purposes of the present topic, when the crime was allegedly committed abroad with no nexus to the forum State, the obligation to extradite or prosecute would necessarily reflect an exercise of universal jurisdiction,[456] which is "the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events"[457] where neither the victims nor alleged offenders are nationals of the forum State and no harm was allegedly caused to the forum State's own national interests. However, the obligation to extradite or prosecute can also reflect an exercise of jurisdiction under other bases. Thus, if a State can exercise jurisdiction on another basis, universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation to extradite or prosecute.

Universal jurisdiction is a crucial component for prosecuting alleged perpetrators of crimes of international concern, particularly when the alleged perpetrator is not prosecuted in the territory where the crime was committed.[458] Several international instruments, such as the very widely ratified four Geneva Conventions of 1949 and the Convention against Torture, require the exercise of universal jurisdiction over the offences covered by these instruments, or, alternatively to extradite alleged offenders to another State for the purpose of prosecution.

(19) *Delay in enacting legislation*. According to the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, delay in enacting necessary legislation in order to prosecute suspects adversely affects the State party's implementation of the obligations to conduct a preliminary inquiry and to submit the case to its competent authorities for the purposes of prosecution.[459] The State's obligation extends beyond merely enacting national legislation. The State must also actually exercise its jurisdiction over a suspect, starting by establishing the facts.[460]

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[455] Report of the AU-EU Technical *ad hoc* Expert Group on the Principle of Universal Jurisdiction (8672/1/09/ Rev.1), annex, para. 11. The International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* holds that the performance by States parties to the Convention against Torture of their obligation to establish universal jurisdiction of their courts is a necessary condition for enabling a preliminary inquiry and for submitting the case to their competent authorities for the purpose of prosecution (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 451, para. 74).

[456] According to one author, "The principle of *aut dedere aut judicare* overlaps with universal jurisdiction when a State has no other nexus to the alleged crime or to the suspect other than the mere presence of the person within its territory." (Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, 2005), p. 122).

[457] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) I.C.J. Reports 2002*, p. 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 75 para. 42.

[458] It should be recalled that the "Obligation to extradite or prosecute" in art. 9 of the 1996 draft code is closely related to the "Establishment of jurisdiction" under art. 8 of the draft code, which requires each State party thereto to take such measures as may be necessary to establish its jurisdiction over genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes, irrespective of where or by whom those crimes were committed. The Commission's commentary to art. 8 makes it clear that universal jurisdiction is envisaged (*Official Record of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 7).

[459] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 451–452, paras. 76, 77.

[460] *Ibid.*, p. 453, para. 84.

(20) *Obligation to investigate.* According to the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the obligation to investigate consists of several elements.

As a general rule, the obligation to investigate must be interpreted in light of the object and purpose of the applicable treaty, which is to make more effective the fight against impunity.[461]

The obligation is intended to corroborate the suspicions regarding the person in question.[462] The starting point is the establishment of the relevant facts, which is an essential stage in the process of the fight against impunity.[463]

As soon as the authorities have reason to suspect that a person present in their territory may be responsible for acts subject to the obligation to extradite or prosecute, they must investigate. The preliminary inquiry must immediately be initiated. This point is reached, at the latest, when the first complaint is filed against the person,[464] at which stage the establishment of the facts becomes imperative.[465]

However, simply questioning the suspect in order to establish his/her identity and inform him/her of the charges cannot be regarded as performance of the obligation to conduct a preliminary inquiry.[466]

The inquiry is to be conducted by the authorities who have the task of drawing up a case file and collecting facts and evidence (for example, documents and witness statements relating to the events at issue and to the suspect's possible involvement). These authorities are those of the State where the alleged crime was committed or of any other State where complaints have been filed in relation to the case. In order to fulfil its obligation to conduct a preliminary inquiry, the State in whose territory the suspect is present should seek cooperation of the authorities of the aforementioned States.[467]

An inquiry taking place on the basis of universal jurisdiction must be conducted according to the same standards in terms of evidence as when the State has jurisdiction by virtue of a link with the case in question.[468]

(21) *Obligation to prosecute.* According to the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the obligation to prosecute consists of certain elements.

The obligation to prosecute is actually an obligation to submit the case to the prosecuting authorities; it does not involve an obligation to initiate a prosecution. Indeed, in light of the evidence, fulfilment of the obligation may or may not result in the institution of proceedings.[469] The competent authorities decide whether to initiate proceedings, in the same manner as they would for any alleged offence of a serious nature under the law of the State concerned.[470]

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[461] *Ibid.*, p. 454, para. 86.

[462] *Ibid.*, p. 453, para. 83.

[463] *Ibid.*, pp. 453–454, paras. 85–86.

[464] *Ibid.*, p. 454, para. 88.

[465] *Ibid.*, p. 454, para. 86.

[466] *Ibid.*, pp. 453–454, para. 85.

[467] *Ibid.*, p. 453, para. 83.

[468] *Ibid.*, p. 453, para. 84.

[469] Cf. also *Chili Komitee Nederland v. Pinochet*, Court of Appeal of Amsterdam, 4 Jan. 1995 *Netherlands Yearbook of International Law*, vol. 28 (1997), pp. 363–365, in which the Court of Appeal held that the Dutch Public Prosecutor did not err in refusing to prosecute former Chilean President Pinochet while visiting Amsterdam because Pinochet might be entitled to immunity from prosecution and any necessary evidence to substantiate his prosecution would be in Chile with which the Netherlands had no cooperative arrangements regarding criminal proceedings. See Kimberley N.

Proceedings relating to the implementation of the obligation to prosecute should be undertaken without delay, as soon as possible, in particular once the first complaint has been filed against the suspect.[471]

The timeliness of the prosecution must be such that it does not lead to injustice; hence, necessary actions must be undertaken within a reasonable time limit.[472]

(22) *Obligation to extradite.* With respect to the obligation to extradite:

Extradition may only be to a State that has jurisdiction in some capacity to prosecute and try the alleged offender pursuant to an international legal obligation binding on the State in whose territory the person is present.[473]

Fulfilling the obligation to extradite cannot be substituted by deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State.[474] Formal extradition requests entail important human rights protections which may be absent from informal forms of dispatching the suspect to another State, such as extraordinary renditions. Under extradition law of most, if not all, States, the necessary requirements to be satisfied include double criminality, *ne bis in idem, nullem crimen sine lege*, speciality, and non-extradition of the suspect to stand trial on the grounds of ethnic origin, religion, nationality or political views.

(23) *Compliance with object and purpose.* The steps to be taken by a State must be interpreted in light of the object and purpose of the relevant international instrument or other sources of international obligation binding on that State, rendering the fight against impunity more effective.[475] It is also worth recalling that, by virtue of article 27 of the Vienna Convention on the Law of Treaties, which reflects customary international law, a State party to a treaty may not invoke the provisions of its internal law as justification for

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Trapp, *State Responsibility for International Terrorism* (Oxford: Oxford University Press 2011), p. 88, fn. 132.

[470] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 454 and 456, paras. 90, 94.

[471] *Ibid.*, paras. 115, 117.

[472] *Ibid.*, paras. 114, 115. Cf. Separate Opinion of Judge Çancado Trindade in that case at pp. 546–548, paras. 148, 151–153; Dissenting Opinion of Judge *ad hoc* Sur in the same case at p. 620, para. 50; and Dissenting Opinion of Judge Xue, at p. 578, para. 28.

[473] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 461, para. 120.

[474] Cf. Draft article 12 of the draft articles on the expulsion of aliens adopted by the Commission on second reading in 2014, see *Official Records of the General Assembly, Sixty-ninth Session, Supplement 10* (A/69/10), chap. IV and European Court of Human Rights, *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, paras. 52–60, where the European Court of Human Rights has held that extradition, disguised as deportation in order to circumvent the requirements of extradition, is illegal and incompatible with the right to security of person guaranteed under art. 5 of the European Convention on Human Rights.

[475] See the reasoning in *the case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 453–454, paras. 85–86. Therefore, the Court rules that financial difficulties do not justify Senegal's failure to comply with the obligations under the Convention against Torture (*ibid.*, para. 112). Likewise, seeking guidance from the African Union does not justify Senegal's delay in complying with its obligation under the Convention (*ibid.*).

its failure to perform a treaty.[476] Besides, the steps taken must be in accordance with the rule of law.

(24) In cases of serious crimes of international concern, the purpose of the obligation to extradite or prosecute is to prevent alleged perpetrators from going unpunished by ensuring that they cannot find refuge in any State.[477]

(25) *Temporal scope of the obligation.* The obligation to extradite or prosecute under a treaty applies only to facts having occurred after the entry into force of the said treaty for the State concerned, "unless a different intention appears from the treaty or is otherwise established".[478] After a State becomes party to a treaty containing the obligation to extradite or prosecute, it is entitled, with effect from the date of its becoming party to the treaty, to request another State party's compliance with the obligation to extradite or prosecute.[479] Thus, the obligation to criminalize and establish necessary jurisdiction over acts proscribed by a treaty containing the obligation to extradite or prosecute is to be implemented as soon as the State is bound by that treaty.[480] However, nothing prevents the State from investigating or prosecuting acts committed before the entry into force of the treaty for that State.[481]

(26) *Consequences of non-compliance with the obligation to extradite or prosecute.* In *Belgium v. Senegal*, the Court found that the violation of an international obligation under the Convention against Torture is a wrongful act engaging the responsibility of the State.[482] As long as all measures necessary for the implementation of the obligation have not been taken, the State remains in breach of its obligation.[483] The Commission's articles on responsibility of States for internationally wrongful acts stipulate that the commission of an internationally wrongful act attributable to a State involves legal consequences, including cessation and non-repetition of the act (art. 30), reparation (arts. 31, 34–39) and countermeasures (arts. 49–54).

(27) *Relationship between the obligation and the "third alternative".* With the establishment of the International Criminal Court and various *ad hoc* international criminal tribunals, there is now the possibility that a State faced with an obligation to extradite or prosecute an accused person might have recourse to a third alternative – that of

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[476] *Ibid.*, para. 113.

[477] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 461, para. 120. As also explained by Judge Cançado Trindade,
"… The conduct of the State ought to be one which is conducive to compliance with the obligations of result (in the *cas d'espèce*, the proscription of torture). The State cannot allege that, despite its good conduct, insufficiencies or difficulties of domestic law rendered it impossible the full compliance with its obligation (to outlaw torture and to prosecute perpetrators of it); and the Court cannot consider a case terminated, given the allegedly 'good conduct' of the State concerned." (Separate Opinion of Judge Cançado Trindade in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 508, para. 50 and see also his full reasoning at pp. 505–508, paras. 44–51.)

[478] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 457–458, paras. 100–102, citing art. 28 of the Vienna Convention on the Law of Treaties, which reflects customary international law.

[479] *Ibid.*, p. 458, paras. 103–105.

[480] *Ibid.*, p. 451, para. 75.

[481] *Ibid.*, p. 458, paras. 102, 105.

[482] *Ibid.*, p. 456, para. 95.

[483] *Ibid.*, pp. 460–461, para. 117.

surrendering the suspect to a competent international criminal tribunal.[484] This third alternative is stipulated, for example, in article 11, paragraph 1 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2006.[485]

(28) In her dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judge Xue opines that had Senegal surrendered the alleged offender to an international tribunal constituted by the African Union to try him, they would not have breached their obligation to prosecute under article 7 of the Convention against Torture, because such a tribunal would have been created to fulfil the purpose of the Convention, and this is not prohibited by the Convention itself or by State practice.[486] Of course, if "a different intention appears from the treaty or is otherwise established"[487] so as not to permit the surrender of an alleged offender to an international criminal tribunal, such surrender would not discharge the obligation of the States parties to the treaty to extradite or prosecute the person under their respective domestic legal systems.

(29) It is suggested that in light of the increasing significance of international criminal tribunals, new treaty provisions on the obligation to extradite or prosecute should include this third alternative, as should national legislation.

(30) *Additional observation*. A State might also wish to fulfil both parts of the obligation to extradite or prosecute, for example, by prosecuting, trying and sentencing an offender and then extraditing or surrendering the offender to another State for the purpose of enforcing the judgment.[488]

### (c) Gaps in the existing conventional regime and the "third alternative"

(31) As noted in paragraph (14) above, the Commission reiterates that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute, notably in relation to most crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflict. It also notes that it had placed on its programme of work in 2014 the topic "Crimes against humanity", which would include as one element of a new treaty an obligation to extradite or prosecute for those crimes.[489] It further suggested that, in relation to genocide, the international cooperation regime could be strengthened beyond the one that exists under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[490]

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[484] Art. 9 of the 1996 Draft code of Crimes against the Peace of Mankind stipulates that the obligation to extradite or prosecute under that article is "[w]ithout prejudice to the jurisdiction of an international criminal court".

[485] "The State party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution."

[486] Dissenting Opinion of Judge Xue, at p. 582, para. 42 (dissenting on other points).

[487] Article 28 of the Vienna Convention on the Law of Treaties.

[488] This possibility was raised by Special Rapporteur Galicki in his preliminary report (A/CN.4/571), paras. 49–50.

[489] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Annex B.

[490] *Ibid.*, Annex A, para. 20. A study by the Chatham House suggested that the Commission's future work on this topic should concentrate on drafting a treaty obligation to extradite or prosecute in respect of core international crimes and emulate the extradite-or-prosecute mechanism developed in Article 7 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* and incorporated in the 1984 *UN Convention against Torture and Other Cruel, Inhuman or Degrading*

(32) Instead of drafting a set of model provisions to close the gaps in the existing conventional regime regarding the obligation to extradite or prosecute, the Commission recalls that an obligation to extradite or prosecute for, *inter alia*, genocide, crimes against humanity and war crimes is already stipulated in article 9 of the 1996 Draft Code, which reads:

> "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual."[491]

(33) The Commission also refers to the "Hague formula", quoted in paragraph (10) above. As noted in that paragraph, the "Hague formula", has served as a model for most contemporary conventions containing the obligation to extradite or prosecute,[492] including the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption which have been mentioned by several delegations in the Sixth Committee in 2013 as a possible model to close the gaps in the conventional regime. In addition, the Judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* is helpful in construing the Hague formula.[493] The Commission recommends that States consider the Hague formula in undertaking to close any gaps in the existing conventional regime.

(34) The Commission further acknowledges that some States[494] have inquired about the link between the obligation to extradite or prosecute and the transfer of a suspect to an international or special court or tribunal, whereas other States[495] treat such a transfer differently from extradition. As pointed out in paragraph (27) above, the obligation to extradite or prosecute may be satisfied by surrendering the alleged offender to a competent international criminal tribunal.[496] A provision to this effect appears in article 11, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which reads:

> "The State party in the territory under whose jurisdiction a person alleged to have committed [an act of genocide/a crime against humanity/a war crime] is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to a competent

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*Treatment and Punishment* and, most recently, in the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance*. See Miša Zgonec-Rožej and Joanne Foakes, "International criminals: Extradite or Prosecute?" Chatham House Briefing Paper, Doc. IL BP 2013/01, Jul. 2013.

[491] See also the Commission's commentary on this article in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. II.

[492] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Annex A, para. 16 and accompanying footnote 28.

[493] *Ibid.*, paras. 21–22.

[494] Chile, France, and Thailand.

[495] Canada and the United Kingdom of Great Britain and Northern Ireland.

[496] See also the Council of Europe, *Extradition, European Standards: Explanatory notes on the Council of Europe convention and protocol and minimum standards protecting persons subject to transnational criminal proceedings* (Council of Europe Publishing, Strasbourg, 2006), where it is stated that: "… In the era of international criminal tribunals, the principle [*aut dedere aut judicare*] may be interpreted *lato sensu* to include the duty of the state to transfer the person to the jurisdiction of an international organ, such as the International Criminal Court" (*ibid.*, p. 119, footnote omitted).

international criminal tribunal or any other competent court whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution."

(35) Under such a provision, the obligation to extradite or prosecute may be satisfied by a "third alternative", which would consist of the State surrendering the alleged offender to a competent international criminal tribunal or a competent court whose jurisdiction the State concerned has recognized. The competent tribunal or court may take a form similar in nature to the Extraordinary African Chambers, set up within the Senegalese court system by an agreement dated 22 August 2012 between Senegal and the African Union, to try Mr. Habré in the wake of the Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*[497] This kind of "internationalization" within a national court system is not unique. As a court established by the agreement between Senegal and the African Union, with the participation of national and foreign judges in these Chambers, the Extraordinary African Chambers follow the examples of the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

(36) The above examples highlight the essential elements of a provision containing the obligation to extradite or prosecute, and may assist States in choosing the formula that they consider to be most appropriate for a particular context.

### (d) The priority between the obligation to prosecute and the obligation to extradite, and the scope of the obligation to prosecute

(37) The Commission takes note of the suggestion made by one delegation[498] to the Sixth Committee in 2013 to analyze these two aspects of the topic. It also notes the suggestions of other delegations[499] that the Commission establish a general framework of extraditable offences or guiding principles on the implementation of the obligation to extradite or prosecute. It wishes to draw attention to the Secretariat Survey (2010) and paragraphs (6)–(13) above, which have addressed these issues.

(38) To recapitulate, beyond the basic common features, provisions containing the obligation to extradite or prosecute in multilateral conventions vary considerably in their formulation, content and scope. This is particularly so in terms of the conditions imposed on States with respect to extradition and prosecution and the relationship between these two courses of action. Although the relationship between the obligation to extradite and the obligation to prosecute is not identical, the relevant provisions seem to fall into two main categories; namely, (a) those clauses pursuant to which the obligation to prosecute is only triggered by a refusal to surrender the alleged offender following a request for extradition; and (b) those imposing an obligation to prosecute *ipso facto* when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition.

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[497] The Extraordinary African Chambers have jurisdiction to try the person or persons most responsible for international crimes committed in Chad between 7 June 1982 and 1 December 1990. The Trial Chamber and the Appeals Chamber are each composed of two Senegalese judges and one non-Senegalese judge, who presides over the proceedings. The Trial Chamber and the Appeals Chamber are each composed of two Senegalese judges and one non-Senegalese judge, who presides over the proceedings, see *Statute of the Extraordinary African Chambers*, articles 3 and 11, *International Legal Materials*, vol. 52, (2013), pp. 1020–1036).

[498] Mexico.

[499] Cuba and Belarus, respectively.

(39) Instruments containing clauses in the first category impose on States Parties (at least those that do not have a special link with the offence) an obligation to prosecute only when extradition has been requested and not granted, as opposed to an obligation *ipso facto* to prosecute the alleged offender present in their territory. They recognize the possibility that a State may refuse to grant a request for extradition of an individual on grounds stipulated either in the instrument or in national legislation. However, in the event of refusal of extradition, the State is obliged to prosecute the individual. In other words, these instruments primarily focus on the option of extradition and provide the alternative of prosecution as a safeguard against impunity.[500] In addition, instruments in this category may adopt very different mechanisms for the punishment of offenders, which may affect the interaction between extradition and prosecution. In some instances, there are detailed provisions concerning the prosecution of offences that are the subject of the instrument, while in other cases, the process of extradition is regulated in greater detail. The 1929 International Convention for the Suppression of Counterfeiting Currency and subsequent conventions inspired by it[501] belong to this first category.[502] Multilateral conventions on extradition also fall into this category.[503]

(40) Clauses in the second category impose upon States an obligation to prosecute *ipso facto* in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained, regardless of any request for extradition. Only in the event that a request for extradition is made does the State concerned have the discretion to choose between extradition and prosecution.[504] The clearest example of such clauses is the relevant

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[500] Secretariat Survey (2010), para. 132. In effect, these conventions appear to follow what was originally foreseen by Hugo Grotius when he referred to the principle *aut dedere aut punire*. Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by Francis W. Kelsey, Oxford/London, Clarendon Press/Humphrey Milford, 1925), pp. 527–529, at p. 527.

[501] E.g., the 1936 *Convention for the Suppression of the Illicit Traffic in Dangerous Drugs*; the 1937 *Convention for the Prevention and Punishment of Terrorism*; the 1950 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*; the 1961 *Single Convention on Narcotic Drugs*; and the 1971 *Convention on Psychotropic Substances*. See also Secretariat Survey (2010), para. 29.

[502] The overall structure of the mechanism for the punishment of offenders in these conventions is based on the idea that the State in whose territory the crime was committed will request the extradition of the offender who has fled to another State and that extradition should, in principle, be granted. These conventions, however, recognise that States may be unable to extradite in some cases (most notably when the individual is their national or when they have granted asylum to him) and provide for the obligation to prosecute as an alternative. Secretariat Survey (2010), para. 133 and fn. 327 citing Marc Henzelin, *Le principe de l'universalité en droit penal international. Droit et obligation pour les Etats de poursuivre et de juger selon le principe de l'universalité* (Basel/Geneva/Munich/Brussels, Helbing&Lichtenhahn/Faculté de droit de Genève/Bruylant, 2000), p. 286, who qualifies the system as *primo dedere secundo prosequi*.

[503] E.g., the 1981 *Inter-American Convention on Extradition*; the 1957 *European Convention on Extradition*; the 1961 *General Convention on Judicial Cooperation (Convention générale de coopération en matière de justice)*; the 1994 *Economic Community of West African States (ECOWAS) Convention on Extradition*; and the *London Scheme for Extradition within the Commonwealth*. These conventions are based on the general undertaking by States Parties to surrender to one another all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted for the carrying out of a sentence or detention order. However, the obligation to extradite is subject to a number of conditions and exceptions, including when the request involves the national of the requested State. When extradition is refused, the conventions impose an alternative obligation to prosecute the alleged offender as a mechanism to avoid impunity. See also Secretariat Survey (2010), para. 134.

[504] Secretariat Survey (2010), para. 127, and fn. 307. Those opining that the accused must be present in the territory of the State concerned as a precondition of the assertion of universal jurisdiction include

common article of the 1949 Geneva Conventions, which provides that each State party "shall bring" persons alleged to have committed, or to have ordered to be committed, grave breaches to those Conventions, regardless of their nationality, before its own courts, but "may also, if it prefers", hand such persons over for trial to another State party concerned.[505] As for the Hague formula, its text does not unequivocally resolve the question of whether the obligation to prosecute arises *ipso facto* or only once a request for extradition is submitted and not granted.[506] In this regard, the findings of the Committee against Torture and the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, in relation to a similar provision contained in article 7 of the 1984 Convention against Torture,[507] are instructive. The Committee against Torture has explained that:

> "… the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the

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Judges Higgins, Kooijmans and Buergenthal (Joint Separate Opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), I.C.J .Reports 2002*, p. 80, para. 57). See also Separate Opinion of Judge Guillaume, *ibid.*, para. 9 and Gilbert Guillaume, "Terrorisme et droit international", *Recueil des cours de l'Académie de droit international*, vol. 215, 1990, pp. 368–369. However, Marc Henzelin (*supra* note 502, p. 354) argues that the presence of the alleged offender in the territory of the State is not required for prosecution under the relevant provision of the 1949 *Geneva Conventions*.

[505] While this provision appears to give a certain priority to prosecution by the custodial State, it also recognises that this State has the discretion to opt for extradition, provided that the requesting State has made out a *prima facie* case. Secretariat Survey (2010), para. 128, citing Declan Costello, "International Terrorism and the Development of the Principle *Aut Dedere Aut Judicare*", *The Journal of International Law and Economics*, vol. 10, 1975, p. 486; M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht/Boston/London, Martinus Nijhoff, 1995), p. 15; and Christian Maierhöfer, "*Aut dedere – aut judicare*". *Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung* (Berlin, Duncker & Humblot, 2006), pp. 75–76. Authors who emphasize the priority attributed to prosecution in the 1949 Geneva Conventions are said to include Luigi Condorelli, "Il sistemadella repression dei crimini di Guerra nelle Convenzioni di Ginevra del 1949 e nel primo protocollo addizionale del 1977", in P. Lamberti Zanardi & G. Venturini, eds., *Crimini di guerra e competenza delle giurisdizioni nazionali: Atti del Convegno, Milano, 15–17 maggio 1997* (Milan, Giuffrè, 1998), pp. 35–36; and Henzelin, *supra*, p. 353 (who qualifies the model of the 1949 Geneva Conventions as *primo prosequi secundo dedere*). *C.f.* also art. 88 (2) of *Additional Protocol I* to the 1949 *Geneva Conventions*, which calls on States Parties to "give due consideration to the request of the State in whose territory the alleged offence has occurred", thus implying that prosecution by the latter State would be preferable.

[506] Art. 7 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* provides that "[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged … to submit the case to its competent authorities for the purpose of prosecution".

[507] Art. 7 states: "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

> objective of the provision being to prevent any act of torture from going unpunished."[508]

(41) Likewise, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice considered article 7 (1) of the Convention against Torture as requiring:

> "the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.
>
> However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. …"[509]

(42) Accordingly, it follows that the choice between extradition and submission for prosecution under the Convention did not mean that the two alternatives enjoyed the same weight. Extradition was an option offered to the State by the Convention while prosecution was an obligation under the Convention, the violation of which was a wrongful act resulting in State responsibility.[510]

(43) With respect to the Commission's 1996 Draft Code, article 9 provides that the State Party in whose territory an individual alleged to have committed these crimes is found "shall extradite or prosecute that individual". The commentary to article 9 clarifies that the obligation to prosecute arises independently from any request for extradition.[511]

(44) The scope of the obligation to prosecute has already been elaborated in paragraphs (21) to (26) above.

### (e) The relationship of the obligation to extradite or prosecute with *erga omnes* obligations or *jus cogens* norms

(45) The Commission notes that one delegation[512] to the Sixth Committee in 2013 raised the issue of the impact of the *aut dedere aut judicare* principle on international responsibility when it relates to *erga omnes* obligations or *jus cogens* norms, such as the prohibition of torture. The delegation suggested an analysis of the following questions: (a) in respect of whom the obligation exists; (b) who can request extradition; and (c) who has a

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[508] *Guengueng et al. v. Senegal*, Merits, Decision of the Committee Against Torture under Art. 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 36th Sess., Doc CAT/C/36/D/181/2001 dated 19 May 2006, para. 9.7.

[509] In the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 456, paras. 94–95.

[510] *Ibid.*, p. 456, para. 95.

[511] The custodial State has an obligation "to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicated that it was willing to prosecute the case by requesting extradition". Para. 3 of the commentary to art. 9, *Yearbook of the International Law Commission 1996*, vol. II (Part Two), p. 31. Reference should also be made to the commentary to art. 8 (whereby each State party "shall take such measures as may be necessary to establish its jurisdiction" over the crimes set out in the Draft Code "irrespective of where or by whom those crimes were committed").

[512] Mexico.

legal interest in invoking the international responsibility of a State for being in breach of its "obligation to prosecute or extradite".

(46) Several members of the Commission pointed out that this area was likely to concern the interpretation of conventional norms. The statements of the International Court of Justice in this regard in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* must be read within the specific context of that particular case. There, the Court interpreted the object and purpose of the Convention against Torture as giving rise to "obligations *erga omnes partes*", whereby each State Party had a "common interest" in compliance with such obligations and, consequently, each State Party was entitled to make a claim concerning the cessation of an alleged breach by another State Party.[513] The issue of *jus cogens* was not central to this point. In the understanding of the Commission, the Court was saying that insofar as States were parties to the Convention against Torture, they had a common interest to prevent acts of torture and to ensure that, if they occurred, those responsible did not enjoy impunity.

(47) Other treaties, even if they may not involve *jus cogens* norms, may lead to *erga omnes* obligations as well. In other words, all States Parties may have a legal interest in invoking the international responsibility of a State Party for being in breach of its obligation to extradite or prosecute.

(48) The State that can request extradition normally will be a State Party to the relevant convention or have a reciprocal extradition undertaking/arrangement with the requested State, having jurisdiction over the offence, being willing and able to prosecute the alleged offender, and respecting applicable international norms protecting the human rights of the accused.[514]

### (f) The customary international law status of the obligation to extradite or prosecute

(49) The Commission notes that some delegations to the Sixth Committee opined that there was no obligation to extradite or prosecute under customary international law, whereas others were of the view that the customary international law status of the obligation merited further consideration by the Commission.[515]

(50) It may be recalled that in 2011 the then Special Rapporteur Galicki, in his Fourth Report, proposed a draft article on international custom as a source of the obligation *aut dedere aut judicare*.[516]

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[513] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 449–450, paras. 67–70. See also Separate Opinion of Judge Cançado Trindade, pp. 527–529, paras. 104–108, and Declaration of Judge Donoghue, pp. 586–589, paras. 9–17. C.f. Dissenting Opinion of Judge Xue, pp. 571–577, paras. 2–23, and Dissenting Opinion of Judge *ad hoc* Sur, pp. 608 and 610–611, paras. 13, 19–20. Cf. also the Separate Opinion of Judge Skotnikov, pp. 482–485, paras. 9–22.

[514] See, e.g., Council of Europe, note 496 above, Chap. 4: Material human rights guarantees as limitations to extradition; Danai Azaria, *Code of Minimum Standards of Protection to Individuals Involved in Transnational Proceedings*, Report to the Committee of Experts on Transnational Criminal Justice, European Committee on Crime Problems, Council of Europe, PC-TJ/Docs 2005/PC-TJ (2005) 07 E. Azaria], Strasbourg, 16 Sept. 2005.

[515] A/CN.4/666, para. 60.

[516] A/CN.4/648, para. 95. The draft article read as follows:

> "**Article 4**
>
> **International custom as a source of the obligation *aut dedere aut judicare***
>
> 1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.

(51) However, the draft article was not well received either in the Commission[517] or the Sixth Committee.[518] There was general disagreement with the conclusion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes.

(52) Determining whether the obligation to extradite or prosecute has become or is becoming a rule of customary international law, or at least a regional customary law, may help indicate whether a draft article proposed by the Commission codifies or is progressive development of international law. However, since the Commission has decided not to have the outcome of the Commission's work on this topic take the form of draft articles, it has found it unnecessary to come up with alternative formulas to the one proposed by Mr. Galicki.

(53) The Commission wishes to make clear that the foregoing should not be construed as implying that it has found that the obligation to extradite or prosecute has not become or is not yet crystallising into a rule of customary international law, be it a general or regional one.

(54) When the Commission adopted the Draft Code in 1996, the provision on the obligation to extradite or prosecute thereunder represented progressive development of international law, as explained in paragraph (3) above. Since the completion of the Draft Code, there may have been further developments in international law that reflect State practice and *opinio juris* in this respect.

(55) The Commission notes that in 2012 the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* ruled that it had no jurisdiction to entertain Belgium's claims relating to Senegal's alleged breaches of obligations under customary international law because at the date of Belgium's filing of the Application the dispute between Belgium and Senegal did not relate to breaches of obligations under customary international law.[519] Thus, an opportunity has yet to arise for the Court to determine the customary international law status or otherwise of the obligation to extradite or prosecute.[520]

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2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].

3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2."

[517] *Official Records of* the *General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 320–326.

[518] In particular, some States disagreed with the conclusion that the customary nature of the obligation to extradite or prosecute could necessarily be inferred from the existence of customary rules proscribing specific international crimes. *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its Sixty-sixth Session, prepared by the Secretariat* (A/CN.4/650), para. 48. See also the positions of Argentina, in A/C.6/62/SR.22, para. 58 and the Russian Federation, in A/CN.4/599, para. 54, respectively.

[519] *Judgment, I.C.J. Reports 2012*, p. 422, paras. 53–55, 122 (2), with Judge Abraham and Judge *ad hoc* Sur dissenting on this point (*ibid.*, Separate Opinion of Judge Abraham, pp. 471–476, paras. 3–20; Dissenting Opinion of Judge *ad hoc* Sur, p. 610, para. 17).

[520] Judge Abraham and Judge *ad hoc* Sur concluded that the Court, if it had found jurisdiction, would not have upheld Belgium's claim of the existence of the customary international law obligation to prosecute or extradite. In his Separate Opinion, Judge Abraham considered there was insufficient evidence, based on State practice and *opinio juris*, of a customary obligation for States to prosecute

### (g) Other matters of continued relevance in the 2009 General Framework

(56) The Commission observes that the 2009 General Framework[521] continued to be mentioned in the Sixth Committee[522] as relevant to the Commission's work on the topic.

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before their domestic courts individuals suspected of war crimes or crimes against humanity on the basis of universal jurisdiction, even when limited to the case where the suspect was present in the territory of the forum State. (*ibid.*, Separate Opinion of Judge Abraham, pp. 611–617, paras. 21, 24–25, 31–39).

In his Dissenting Opinion, Judge *ad hoc* Sur said that despite the silence of the Court, or perhaps because of such silence, 'it seems clear that the existence of a customary obligation to prosecute or extradite, or even simply to prosecute, cannot be established in positive law' (*ibid.*, Dissenting Opinion of Judge *ad hoc* Sur, p. 610, para. 18).

By contrast, the Separate Opinions of Judge Cançado Trindade (*ibid.*, Separate Opinion of Judge Cançado Trindade, p. 544, para. 143) and of Judge Sebutinde (*ibid.*, Separate Opinion of Judge Sebutinde, p. 604, paras. 41–42) both stressed that the Court only found that it had no jurisdiction to address the merits of the customary international law issues given the facts presented in the case.

In any case, any reference to the existence or non-existence of the customary law obligation in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, was to the obligation in the cases of crimes against humanity and war crimes in internal armed conflicts. It did not touch upon such obligation in the context of genocide, war crimes in international armed conflicts, or other crimes of international concern like acts of terrorism.

[521] For ease of reference, the 2009 General Framework is reproduced here. It reads as follows:

**List of questions/issues to be addressed**

**(a) The legal bases of the obligation to extradite or prosecute**

(i) The obligation to extradite or prosecute and the duty to cooperate in the fight against impunity;

(ii) The obligation to extradite or prosecute in existing treaties: Typology of treaty provisions; differences and similarities between those provisions, and their evolution (cf. conventions on terrorism);

(iii) Whether and to what extent the obligation to extradite or prosecute has a basis in customary international law;*

(iv) Whether the obligation to extradite or prosecute is inextricably linked with certain particular "customary crimes" (e.g. piracy);*

(v) Whether regional principles relating to the obligation to extradite or prosecute may be identified.*

**(b) The material scope of the obligation to extradite or prosecute**

Identification of the categories of crimes (e.g. crimes under international law; crimes against the peace and security of mankind; crimes of international concern; other serious crimes) covered by the obligation to extradite or prosecute according to conventional and/or customary international law:

(i) Whether the recognition of an offence as an international crime is a sufficient basis for the existence of an obligation to extradite or prosecute under customary international law;*

(ii) If not, what is/are the distinctive criterion/criteria? Relevance of the *jus cogens* character of a rule criminalizing certain conduct?*

(iii) Whether and to what extent the obligation also exists in relation to crimes under domestic laws?

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**(c) The content of the obligation to extradite or prosecute**

(i) Definition of the two elements; meaning of the obligation to prosecute; steps that need to be taken in order for prosecution to be considered "sufficient"; question of timeliness of prosecution;

(ii) Whether the order of the two elements matters;

(iii) Whether one element has priority over the other – power of free appreciation (*pouvoir discrétionnaire*) of the requested State?

**(d) Relationship between the obligation to extradite or prosecute and other principles**

(i) The obligation to extradite or prosecute and the principle of universal jurisdiction (does one necessarily imply the other?);

(ii) The obligation to extradite or prosecute and the general question of "titles" to exercise jurisdiction (territoriality, nationality);

(iii) The obligation to extradite or prosecute and the principles of *nullum crimen sine lege* and *nulla poena sine lege*;**

(iv) The obligation to extradite or prosecute and the principle *non bis in idem* (double jeopardy);**

(v) The obligation to extradite or prosecute and the principle of non-extradition of nationals;**

(vi) What happens in case of conflicting principles (e.g.: non-extradition of nationals *v.* no indictment in national law? obstacles to prosecute *v.* risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged?); constitutional limitations.**

**(e) Conditions for the triggering of the obligation to extradite or prosecute**

(i) Presence of the alleged offender in the territory of the State;

(ii) State's jurisdiction over the crime concerned;

(iii) Existence of a request for extradition (degree of formalism required); Relations with the right to expel foreigners;

(iv) Existence/consequences of a previous request for extradition that had been rejected;

(v) Standard of proof (to what extent must the request for extradition be substantiated);

(vi) Existence of circumstances that might exclude the operation of the obligation (e.g. political offences or political nature of a request for extradition; emergency situations; immunities).

**(f) The implementation of the obligation to extradite or prosecute**

(i) Respective roles of the judiciary and the executive;

(ii) How to reconcile the obligation to extradite or prosecute with the discretion of the prosecuting authorities;

(iii) Whether the availability of evidence affects the operation of the obligation;

(iv) How to deal with multiple requests for extradition;

(v) Guarantees in case of extradition;

(vi) Whether the alleged offender should be kept in custody awaiting a decision on his or her extradition or prosecution; or possibilities of other restrictions to freedom?;

(vii) Control of the implementation of the obligation;

(viii) Consequences of non-compliance with the obligation to extradite or prosecute.

(57) The 2009 General Framework raised several issues in relation to the obligation to extradite or prosecute that are covered in the preceding paragraphs, but some issues have not, namely: the obligation's relationship with the principles of *nullum crimen sine lege* and *nulla poena sine lege* and the principle *non bis in idem* (double jeopardy); the implications of a conflict between various principles (e.g. non-extradition of nationals versus no indictment in national law; obstacles to prosecution versus risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged); constitutional limitations; circumstances excluding the operation of the obligation (e.g. political offences or political nature of a request for extradition; emergency situations; immunities); the problem of multiple requests for extradition; guarantees in case of extradition; and other issues related to extradition in general.

(58) The Commission notes that the United Nations Office on Drugs and Crime has prepared the 2004 Model Law on Extradition, which addresses most of these issues.[523] The Secretariat Survey (2010) has also explained that multilateral conventions on extradition usually stipulate the conditions applicable to the extradition process.[524] Nearly all such conventions subject extradition to the conditions provided by the law of the requested State. There may be grounds of refusal that are connected to the offence (e.g. the expiry of the statute of limitations, the failure to satisfy requirements of double criminality, specialty, *nullum crimen sine lege* and *nulla poena sine lege* or *non bis in idem*, or the fact that the crime is subject to death penalty in the requesting State) or not so connected (e.g. the granting of political asylum to the individual or the existence of humanitarian reasons to deny extradition). The degree of specificity of the conditions applicable to extradition varies depending on factors such as the specific concerns expressed during the course of negotiations (e.g. non-extradition of nationals, application or non-application of the political exception or fiscal exception clauses), the particular nature of the offence (e.g. the risk of refusal of extradition based on the political character of the offence appears to be more acute with respect to certain crimes), and drafting changes to take into account problems that may have been overlooked in the past (e.g. the possible triviality of the request for extradition or the protection of the rights of the alleged offender) or to take into account new developments or a changed environment.[525]

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**(g) The relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal (the "third alternative")**

To what extent the "third" alternative has an impact on the other two.

[* It might be that a final determination on these questions will only be possible at a later stage, in particular after a careful analysis of the scope and content of the obligation to extradite or prosecute under existing treaty regimes. It might also be advisable to examine the customary nature of the obligation in relation to specific crimes.

** This issue might need to be addressed also in relation to the implementation of the obligation to extradite or prosecute (f).]

[522] At the Sixth Committee debate in 2012, Austria, the Netherlands, and Vietnam considered the 2009 General Framework a valuable supplement to the work of the Commission. In the Netherlands' opinion, the work of the Commission should eventually result in presenting draft articles based on that General Framework. At the Sixth Committee debate in 2013, Austria reiterated the usefulness of the 2009 General Framework to the work of the present Working Group.

[523] Available at http://www.unodc.org/pdf/model_law_extradition.pdf. See also Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, available at: http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf (visited on 3 June 2014).

[524] Secretariat Survey (2010), para. 139.

[525] *Ibid.*, para. 142.

(59) The relationship between the obligation to extradite or prosecute and other principles as enumerated in the 2009 General Framework belongs not only to international law, but also to the constitutional law and domestic law of the States concerned. Whatever the conditions under domestic law or a treaty pertaining to extradition, they must not be applied in bad faith, with the effect of shielding an alleged offender from prosecution in or extradition to an appropriate criminal jurisdiction. In the case of core crimes, the object and purpose of the relevant domestic law and/or applicable treaty is to ensure that perpetrators of such crimes do not enjoy impunity, implying that such crimes can never be considered political offences and be exempted from extradition.[526]

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[526] A good example is art. 1 of the Additional Protocol, dated 15 Oct. 1975, to the 1957 European Convention on Extradition, which reads:

> "For the application of Article 3 [on political offences] of the Convention, political offences shall not be considered to include the following:
>
> (a) the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;
>
> (b) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;
>
> (c) any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions" *(Council of Europe Treaty Series No. 086)*.

# Chapter VII
# Subsequent agreements and subsequent practice in relation to the interpretation of treaties

## A. Introduction

66. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[527] At its sixty-first session (2009), the Commission established the Study Group on Treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[528]

67. From the sixty-second to the sixty-fourth session (2010–2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairman, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction;[529] the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;[530] and subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[531]

68. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,[532] also decided (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[533]

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[527] At its 2997th meeting, on 8 August 2008. See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353. For the syllabus of the topic, see *ibid*., annex A. The General Assembly, in paragraph 6 of resolution 63/123 of 11 December 2008, took note of the decision.

[528] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 220–226.

[529] *Ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 344–354; and *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 337.

[530] *Ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 338–341; and *Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 230–231.

[531] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 232–234. At the sixty-third session (2011), the Chairman of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairman presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairman and agreed upon by the Study Group (*ibid.*, paras. 235–239).

[532] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 226 and 239.

[533] *Ibid.*, paras. 227.

69. At the sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/660) and provisionally adopted five draft conclusions.[534]

## B. Consideration of the topic at the present session

70. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/671), which it considered at its 3205th to 3209th meetings, from 15 to 22 May 2014.

71. In his second report, the Special Rapporteur considered the following aspects of the topic: the identification of subsequent agreements and subsequent practice (section II); possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (section III); the form and value of subsequent practice under article 31, paragraph 3 (b) (section IV); the conditions for an "agreement" of the parties regarding the interpretation of a treaty under article 31, paragraph 3 (section V); decisions adopted within the framework of Conferences of States Parties (section VI); and the possible scope for interpretation by subsequent agreements and subsequent practice (section VII). The report also included some information on the future programme of work (section VIII). The Special Rapporteur proposed a draft conclusion corresponding with each of the issues addressed in sections II to VII.[535]

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[534] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 33 to 39. The Commission provisionally adopted draft conclusions 1 (General rule and means of treaty interpretation); 2 (Subsequent agreements and subsequent practice as authentic means of interpretation); 3 (Interpretation of treaty terms as capable of evolving over time); 4 (Definition of subsequent agreement and subsequent practice); and 5 (Attribution of subsequent practice).

[535] The six draft conclusions proposed by the Special Rapporteur read as follows:

**Draft conclusion 6**
**Identification of subsequent agreements and subsequent practice**

The identification of subsequent agreements and subsequent practice under article 31 (3) and article 32 requires careful consideration, in particular of whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations.

**Draft conclusion 7**
**Possible effects of subsequent agreements and subsequent practice in interpretation**

(1) Subsequent agreements and subsequent practice under articles 31 (3) and 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties.

(2) The value of a subsequent agreement or subsequent practice as a means of interpretation may, *inter alia*, depend on their specificity.

**Draft conclusion 8**
**Forms and value of subsequent practice under article 31 (3) (b)**

Subsequent practice under article 31 (3) (b) can take a variety of forms and must reflect a common understanding of the parties regarding the interpretation of a treaty. Its value as a means of interpretation depends on the extent to which it is concordant, common and consistent.

**Draft conclusion 9**
**Agreement of the parties regarding the interpretation of a treaty**

(1) An agreement under article 31 (3) (a) and (b) need not be arrived at in any particular form nor be binding as such.

72. At its 3209th meeting, on 22 May 2014, the Commission referred draft conclusions 6 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee.

73. At its 3215th meeting, on 5 June 2014, the Commission considered the report of the Drafting Committee and provisionally adopted five draft conclusions (see section C.1 below).

74. At its 3239th to 3240th meetings, on 6 August 2014, the Commission adopted the commentaries to the draft conclusions provisionally adopted at the current session (see section C.2 below).

## C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session

### 1. Text of the draft conclusions

75. The text of the draft conclusions provisionally adopted by the Commission at its sixty-sixth session is reproduced below.

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(2) An agreement under article 31 (3) (b) requires a common understanding regarding the interpretation of a treaty of which the parties are aware. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31 (3) (b) may vary. Silence on the part of one or more parties can, when the circumstances call for some reaction, constitute acceptance of the subsequent practice.

(3) A common subsequent agreement or practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty or to establish a practical arrangement (*modus vivendi*).

**Draft conclusion 10**
**Decisions adopted within the framework of a Conference of States Parties**

(1) A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

(2) The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and the applicable rules of procedure. Depending on the circumstances, such a decision may embody a subsequent agreement under article 31 (3) (a), or give rise to subsequent practice under article 31 (3) (b) or article 32.

(3) A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31 (3) in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted.

**Draft conclusion 11**
**Scope for interpretation by subsequent agreements and subsequent practice**

(1) The scope for interpretation by subsequent agreements or subsequent practice as authentic means of interpretation under article 31 (3) may be wide.

(2) It is presumed that the parties to a treaty, by a subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized.

### Conclusion 6
### Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

### Conclusion 7
### Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

### Conclusion 8
### Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

### Conclusion 9
### Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

### Conclusion 10
### Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

## 2. Text of the draft conclusions with commentaries thereto provisionally adopted by the Commission at its sixty-sixth session

76. The text of the draft conclusions, together with commentaries, provisionally adopted by the Commission at the sixty-sixth session, is reproduced below.

### Conclusion 6
### Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

#### Commentary

(1) The purpose of draft conclusion 6 is to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified.

(2) The first sentence of paragraph 1 recalls that the identification of subsequent agreements and subsequent practice for the purposes of article 31, paragraph 3, (a) and (b), requires particular consideration of the question whether the parties, by an agreement or a

practice have taken a position regarding the interpretation of a treaty, or whether they were motivated by other considerations.

(3) Subsequent agreements under article 31, paragraph 3 (a), must be "regarding the interpretation of the treaty or the application of its provisions", and subsequent practice under article 31, paragraph 3 (b), must be "in the application of the treaty" and thereby establish an agreement "regarding its interpretation".[536] The relationship between the terms "interpretation" and "application" in article 31, paragraph 3, is not clear-cut. "Interpretation" is the process by which the meaning of a treaty, including of one or more of its provisions, is clarified. "Application" encompasses conduct by which the rights under a treaty are exercised or its obligations are complied with, in full or in part. "Interpretation" refers to a mental process, whereas "application" focuses on actual conduct (acts and omissions). In this sense, the two concepts are distinguishable, and may serve different purposes under article 31, paragraph 3 (see below paragraphs (4)–(6)), but they are also closely interrelated and build upon each other.

(4) Whereas there may be aspects of "interpretation" which remain unrelated to the "application" of a treaty,[537] application of a treaty almost inevitably involves some element of interpretation – even in cases in which the rule in question appears to be clear on its face.[538] Therefore, an agreement or conduct "regarding the interpretation" of the treaty and an agreement or conduct "in the application" of the treaty both imply that the parties assume, or are attributed, a position regarding the interpretation of the treaty.[539] Whereas in the case of a "subsequent agreement between the parties regarding the interpretation of the treaty" under article 31, paragraph 3 (a) (first alternative), the position regarding the interpretation of a treaty is specifically and purposefully assumed by the parties, this may be less clearly identifiable in the case of a "subsequent agreement ... regarding ... the

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[536] See draft conclusion 4, paras. 1–3, and commentary paras. 16–19, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10, chap. IV. Sect. C.2).

[537] According to G. Haraszti, interpretation has "the elucidation of the text as to its meaning as its objective" whereas application "implies the specifying the consequences devolving on the contracting parties" (see G. Haraszti, *Some Fundamental Problems in the Law of Treaties* (Akadémiai Kiadó, 1973), p. 18); he recognizes, however, that "a legal rule manifesting itself in whatever form cannot be applied unless its content has been elucidated" (*ibid.*).

[538] Harvard Draft Convention on the Law of Treaties, *American Journal of International Law Supp.*, vol. 29, 1935, p. 778, at pp. 938–939; A. McNair, *The Law of Treaties* (Oxford, 1961), 372; I. Sinclair, *The Vienna Convention on the Law of Treaties*, (2nd ed., Manchester University Press, 1984), 116; Report of the Study Group of the International Law Commission on the fragmentation of international law (A/CN.4/L.682 and Corr.1, para. 423); R. Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2008), pp. 27–29 and 213; M.K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 151, 1976), p. 47; U. Linderfalk, "Is the hierarchical structure of articles 31 and 32 of the Vienna Convention real or not? Interpreting the rules of interpretation", *Netherlands International Law Review*, vol. 54, No. 1 (2007), pp. 141–144 and p. 147; G. Distefano, "La pratique subséquente des États parties à un traité", *Annuaire français de droit international*, vol. 40, 1994, p. 44; M.E. Villiger, "The rules on interpretation: misgivings, misunderstandings, miscarriage? The 'crucible' intended by the International Law Commission" in *The Law of Treaties beyond the Vienna Convention*, E. Cannizzaro, ed. (Oxford, Oxford University Press, 2011), p. 111.

[539] Gardiner, *supra* note 538, p. 235; U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht, Springer, 2007), p. 162; W. Karl, *Vertrag und spätere Praxis im Völkerrecht*, vol. 84, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Berlin, Springer, 1983), pp. 114 and 118; O. Dörr, "Article 31. General rule of interpretation", in *Vienna Convention on the Law of Treaties – A Commentary*, O. Dörr and K. Schmalenbach, eds. (Springer, 2012), p. 556, paras. 80 and 82.

application of its provisions" under article 31, paragraph 3 (a) (second alternative).[540] Assuming a position regarding interpretation "by application" is also implied in simple acts of application of the treaty under articles 31, paragraph 3 (b), that is, in "every measure taken on the basis of the interpreted treaty".[541] The word "or" in article 31, paragraph 3 (a), thus does not describe a mutually exclusive relationship between "interpretation" and "application".

(5) The significance of an "application" of a treaty, for the purpose of its interpretation, is, however, not limited to the identification of the position which the State party concerned thereby assumes regarding its interpretation. Indeed, the way in which a treaty is applied not only contributes to determining the meaning of the treaty, but also to the identification of the degree to which the interpretation which the States parties have assumed is "grounded" and thus more or less firmly established.

(6) It should be noted that an "application" of the treaty does not necessarily reflect the position of a State party that such application is the only legally possible one under the treaty and under the circumstances.[542] Further, the concept of "application" does not exclude certain conduct by non-State actors which the treaty recognizes as forms of its application which is attributable to its parties.[543] and hence can constitute practice establishing the agreement of the parties. Finally, the legal significance of a particular conduct in the application of a treaty is not necessarily limited to its possible contribution to interpretation under article 31, but may also contribute to meeting the burden of proof[544] or to fulfilling the conditions of other rules.[545]

(7) Subsequent conduct which is not motivated by a treaty obligation is not "in the application of the treaty" or "regarding" its interpretation, within the meaning of article 31, paragraph 3. In the Certain Expenses case, for example, some judges doubted whether the continued payment by the Member States of the United Nations of their membership contributions signified acceptance of a certain practice of the organization.[546] Judge Fitzmaurice formulated a well-known warning in this context, according to which "the

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[540] This second alternative was introduced at the proposal of Pakistan, but its scope and purpose was never addressed or clarified, see *Official Records of the United Nations Conference on the Law of Treaties, Official Records*, A/CONF.39/11, at p. 168, para. 53.

[541] Linderfalk, *supra* note 539, pp. 164–165 and 167; see draft conclusions 1 (4) and 4 (3), *supra* note 536, p. 12.

[542] See below draft conclusion 7 (1).

[543] See L. Boisson de Chazournes, "Subsequent Practice, Practices, and 'Family Resemblance': Towards Embedding Subsequent Practice in its Operative Milieu" in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press, 2013), p. 53, at pp. 54, 56 and 59–60.

[544] In the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 117, para. 105, the International Court of Justice denied that certain conduct (statements) satisfied the burden of proof with respect to the Russian Federation's compliance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination between 1999 and July 2008, in particular because the conduct was not found to specifically relate to the Convention. According to Judge Simma, the burden of proof had been met to some degree, see *ibid., Separate Opinion of Judge Simma*, pp. 199–223, paras. 23–57.

[545] In the case concerning the *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, the International Court of Justice analysed subsequent practice not only in the context of treaty interpretation but also in the context of acquisitive prescription, see p. 1092, para. 71, p. 1096, para. 79, and p. 1105, para. 97.

[546] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 151, at pp. 201–202 (*Separate Opinion of Judge Fitzmaurice*) and pp. 189–195 (*Separate Opinion of Judge Spender*).

argument drawn from practice, if taken too far, can be question-begging".[547] According to Fitzmaurice, it would be "hardly possible to infer from the mere fact that Member States pay, that they necessarily admit in all cases a positive legal obligation to do so".[548]

(8) Similarly, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject-matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court.[549]

(9) Another example of a voluntary practice which is not meant to be "in application of" or "regarding the interpretation" of a treaty concerns "complementary protection" in the refugee law context. Persons who are denied refugee status under the Convention relating to the Status of Refugees are nonetheless often granted "complementary protection", which is equivalent to that under the Convention. States which grant complementary protection, however, do not consider themselves as acting "in the application of" the Convention or "regarding its interpretation".[550]

(10) It is sometimes difficult to distinguish relevant subsequent agreements or practice regarding the interpretation or in the application of a treaty under article 31, paragraph 3 (a) and (b), from other conduct or developments in the wider context of the treaty, including from "contemporaneous developments" in the subject area of the treaty. Such a distinction is, however, important since only conduct regarding interpretation by the parties introduces their specific authority into the process of interpretation. The general rule would seem to be that the more specifically an agreement or a practice is related to a treaty the more interpretative weight it can acquire under article 31, paragraph 3 (a) and (b).[551]

(11) The characterization of a subsequent agreement or subsequent practice under article 31, paragraph 3 (a) and (b); as assuming a position regarding the interpretation of a treaty often requires a careful factual and legal analysis. This point can be illustrated by examples from judicial and State practice.

(12) The jurisprudence of the International Court of Justice provides a number of examples. On the one hand, the Court did not consider a "Joint Ministerial Communiqué" of two States to "be included in the conventional basis of the right of free navigation" since the "modalities for cooperation which they put in place are likely to be revised in order to suit the parties."[552] The Court has also held, however, that the lack of certain assertions

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[547] *Ibid.*, p. 201.

[548] *Ibid.*

[549] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, at p. 76, para. 28.

[550] See A. Skordas, "General provisions: article 5", in *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, A. Zimmermann, ed. (Oxford, Oxford University Press, 2011), p. 682, para. 30; J. McAdam, *Complementary Protection in International Refugee Law* (Oxford, Oxford University Press, 2007), p. 21.

[551] On the "weight" of an agreement or practice as a means of interpretation, see draft conclusion 8, paras. 1–3 below; an example for the need, but also for the occasional difficulty of distinguishing specific conduct by the parties regarding the interpretation of a treaty and more general development see *Maritime Dispute (Peru v. Chile), I.C.J.*, Judgment of 27 January 2014, http://www.icj-cij.org/docket/files/137/17931.pdf; paras. 103, 104–117 and 118–151 (see *supra* note 538).

[552] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 234, para. 40; see also *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1091, para. 68 where the Court implied that one of the

regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice which indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.[553] In any case, the exact significance of a collective expression of views of the parties can only be identified by a careful consideration as to whether and to what extent such expression is meant to be "regarding the interpretation" of the treaty. Accordingly, the Court held in the *Whaling in the Antarctic* case that "relevant resolutions and Guidelines [of the International Whaling Commission] that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available".[554]

(13) When the Iran-United States Claims Tribunal was confronted with the question whether the Claims Settlement Declaration obliged the United States to return military property to Iran, the Tribunal found, referring to the subsequent practice of the parties, that this treaty contained an implicit obligation of compensation in case of non-return:[555]

> "66. [...] Although Paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of U.S. law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph. (...)
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> 68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States. Such a practice, according to article 31 (3) (b) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defence articles would not be approved, the United States expressly stated that "Iran will be reimbursed for the cost of equipment in so far as possible."

This position was criticized by Judge Holtzmann in his dissenting opinion:

> "Subsequent conduct by a State party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty. Here there is no evidence, or even any argument, that the United States' willingness to pay Iran for its properties was in response to a perceived obligation imposed by Paragraph 9. Such conduct would be equally consistent with a recognition of a contractual obligation to make payment. In the absence of any indication that conduct was motivated by the treaty, it is incorrect to use that conduct in interpreting the treaty."[556]

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parties did not consider that certain forms of practical cooperation were legally relevant for the purpose of the question of boundary at issue and thus did not agree with a contrary position of the other party.

[553] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, paras. 55–56; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; Gardiner, *supra* note 538, pp. 232–235.

[554] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J, Judgment of 31 March 2014*, www.icj-cij.org/docket/files/148/18136.pdf, para. 83.

[555] Iran-United States Claims Tribunal, Partial Award No. 382-B1-FT, *The Islamic Republic of Iran and the United States of America*, Iran-USCTR, vol. 19 (1989), pp. 294–295.

[556] Separate Opinion of Judge Holtzmann, Concurring in Part, Dissenting in Part in Iran-United States Claims Tribunal, Partial Award No. 382-B1-FT, *The Islamic Republic of Iran and the United States of America*, Iran-USCTR, vol. 19 (1989), p. 304.

Together, the majority opinion and the dissent clearly identify the need to analyse carefully whether the parties, by an agreement, or a practice assume a position "regarding the interpretation" of a treaty.

(14) The fact that States parties assume a position regarding the interpretation of a treaty sometimes also may be inferred from the character of the treaty or of a specific provision.[557] Whereas subsequent practice in the application of a treaty often consists of conduct by different organs of the State (executive, legislative, judicial or other) in the conscious application of a treaty at different levels (domestic and international), the European Court of Human Rights, for example, mostly does not explicitly address the question whether a particular practice was undertaken "regarding the interpretation" of the Convention.[558] Thus, when describing the domestic legal situation in the Member States, the Court rarely asks whether a particular legal situation results from a legislative process during which the possible requirements of the Convention were discussed. The Court rather presumes that the Member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the Convention, and that they act in a way which reflects their understanding of their obligations.[559] The Inter-American Court of Human Rights has also on occasion used legislative practice as a means of interpretation.[560] Like the International Court of Justice, the European Court of Human Rights has occasionally even considered that the "lack of any apprehension" of the parties regarding a certain interpretation of the Convention may be indicative of their assuming a position regarding the interpretation of the treaty.[561]

(15) Article 118 of Geneva Convention III of 1949 provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The will of a prisoner of war not to be repatriated was intentionally not declared to be relevant by the States parties in order to prevent States from abusively invoking the will of prisoners of war in order to delay repatriation.[562] The International Committee of the Red Cross (ICRC) has, however, always insisted as a condition for its participation that the will of a prisoner of

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[557] See Second Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/CN.4/671 ("Second Report"), p. 9, para. 15.

[558] See, e.g., *Soering v. the United Kingdom. Judgment*, 7 July 1989, Application No. 14038/88, ECHR Series A, No. 161, para. 103; *Dudgeon v. the United Kingdom, Judgment*, 22 October 1981, Application No. 7275/76, ECHR Series A, No. 45, para. 60; *Demir and Baykara v. Turkey, Judgment*, 12 November 2008, Application No. 34503/97, ECHR 2008, para. 48; however, by way of contrast, compare with *Mamatkulov and Askarov v. Turkey* [GC], *Judgment, 4 February 2005*, Application No. 46827/99, ECHR 2005-I, para. 146; *Cruz Varas and others v. Sweden, Judgment*, 20 March 1991, Application No. 15576/89, ECHR Series A, No. 201, para. 100.

[559] See *supra* note 558; see further *Marckx v. Belgium, Judgment*, 13 June 1979, Application No. 6833/74, ECHR Series A, No. 31, para. 41; *Jorgic v. Germany, Judgment*, 12 July 2007, Application No. 74613/01, ECHR 2007-III, para. 69; *Mazurek v. France, Judgment*, 1 February 2007, Application No. 34406/97, ECHR 2000-II, para. 52.

[560] See, for example, *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago, Judgments (Merits, Reparations and Costs, Judgment)*, 21 June 2002, Inter-Am. Ct. H.R. Series C No. 94, para. 12.

[561] *Bankovic et al. v. Belgium and 16 Other Contracting States* (dec.) [GC], Application No. 52207/99, ECHR 2001.XII, para. 62.

[562] C. Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities* (Schulthess, 1977), pp. 145–156 and pp. 171–175; see in general on the duty to repatriate, S. Krähenmann, "Protection of prisoners in armed conflict", *in The Handbook of International Humanitarian Law*, 3rd ed. D. Fleck, ed. (Oxford, Oxford University Press, 2013), pp. 409–410.

war not to be repatriated be respected.[563] This approach, as far as it has been reflected in the practice of States parties, does not necessarily mean, however, that article 118 should be interpreted as demanding that the repatriation of a prisoner of war must not happen against his or her will. The ICRC Study on customary international humanitarian law carefully notes in its commentary on rule 128 A:

> "According to the Fourth Geneva Convention, no protected person may be transferred to a country 'where he or she may have reason to fear persecution for his or her political opinions or religious beliefs' (Art. 45 para. 4 Geneva Convention IV). While the Third Geneva Convention does not contain a similar clause, practice since 1949 has developed to the effect that in every repatriation in which ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC conditions for participation, including ICRC being able to check prior to repatriation (or release in case of a non-international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released)."[564]

(16) This formulation suggests that the State practice of respecting the will of the prisoner of war is limited to cases in which ICRC is involved and in which the organization has formulated such a condition. States have drawn different conclusions from this practice.[565] The 2004 United Kingdom Manual provides that:

> "A more contentious issue is whether prisoners of war must be repatriated even against their will. Recent practice of States indicates that they should not. It is United Kingdom policy that prisoners of war should not be repatriated against their will."[566]

(17) This particular combination of the words "must" and "should" indicates that the United Kingdom, like other States, is not viewing the subsequent practice as demonstrating an interpretation of the treaty according to which the declared will of the prisoner of war must always be respected.[567]

(18) The preceding examples from the case-law and State practice substantiate the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position

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[563] Thus, by its involvement, the International Committee of the Red Cross tries to reconcile the interests in speedy repatriation and the respect of the will of prisoners of war (see Krähenmann, *ibid.*, pp. 409–410).

[564] J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. 1, *Rules* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), p. 455.

[565] J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. 2, *Practice* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), pp. 2893–2894, paras. 844–855 and online update for Australia, Israel, the Netherlands and Spain, available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule128_section d.

[566] United Kingdom of Great Britain and Northern Ireland, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), pp. 205–206, para. 8.170.

[567] The United States manual mentions only the will of prisoners of war who are sick or wounded, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. 2, *Practice*, *supra* note 565, pp. 2893–2894, paras. 844–855; but United States practice after the Second Gulf War was to have the International Committee of the Red Cross establish the prisoner's will and to act accordingly (United States of America, Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (United States Government Printing Office, 1992), pp. 707–708, available from www.dod.mil/pubs/foi/operation_and_plans/PersianGulfWar/404.pdf).

regarding the interpretation of a treaty, or whether they are motivated by other considerations.[568]

(19) The second sentence of paragraph 1 is merely illustrative. It refers to two types of cases which need to be distinguished from practice regarding the interpretation of a treaty.

(20) A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty,[569] or an agreement on a practical arrangement (*modus vivendi*).[570] The following examples are illustrative.

(21) Article 7 of the 1864 Geneva Convention provides that "[a] distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. … [The] … flag … shall bear a red cross on a white ground".[571] During the Russo-Turkish War of 1876–1878 the Ottoman Empire declared that it would in the future use the red crescent on a white ground to mark its own ambulances, while respecting the red cross sign protecting enemy ambulances and stated that the distinctive sign of the Convention "has so far prevented [Turkey] from exercising its rights under the Convention because it gave offence to the Muslim soldiers".[572] This declaration led to a correspondence between the Ottoman Empire, Switzerland (as depositary) and the other parties which resulted in the acceptance of the red crescent only for the duration of the conflict.[573] At The Hague Peace Conferences of 1899 and 1907 and during the Geneva Revision Conference 1906, the Ottoman Empire, Persia and Siam unsuccessfully requested the inclusion of the red crescent, the red lion and sun, and the red flame in the Convention.[574] The Ottoman Empire and Persia, however, at least gained the acceptance of "reservations" which they formulated to that effect in 1906.[575] This acceptance of the reservations of the Ottoman Empire and Persia in 1906 did not mean, however, that the Parties had accepted that the 1864 Geneva Convention had been interpreted in a particular way prior to 1906 by subsequent unopposed practice. The practice by the Ottoman Empire and Persia was rather seen, at least until 1906, as not being

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[568] Second Report, *supra* note 557, pp. 6–11, paras. 11–18. See also L. Crema, "Subsequent agreements and subsequent practice within and outside the Vienna Convention", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford University Press, 2013), pp. 25–26.

[569] See Second Report, *supra* note 557, p. 33, para. 71.

[570] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 234–235, para. 40; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 65–66, paras. 138–140; J. Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 32; for another example see Second Report, *supra* note 557, p. 34, para. 72; and J.R. Crook, "Contemporary practice of the United States", *American Journal of International Law*, vol. 105, 2011, pp. 809–812.

[571] Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865).

[572] "Bulletin international des Sociétés de Secours aux Militaires blesses", No. 29, January 1877, pp. 35–37, quoted in F. Bugnion, *The Emblem of the Red Cross. A Brief History* (ICRC, 1977), p. 15.

[573] "Bulletin international des Sociétés de Secours aux Militaires blesses", No. 31, July 1877, p. 89, quoted in Bugnion, *ibid.*, p. 18.

[574] Bugnion, *ibid.*, pp. 19–31.

[575] Joined by Egypt upon accession in 1923, see Bugnion, *ibid.*, pp. 23–26; It was only on the occasion of the revision of the Geneva Conventions in 1929, when Turkey, Persia and Egypt claimed that the use of other emblems had become a *fait accompli* and that those emblems had been used in practice without giving rise to any objections, that the red crescent and the red lion and sun were finally recognized as a distinctive sign by article 19 (2) of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1929, League of Nations, *Treaty Series*, vol. 118, No. 2733, p. 303).

covered by the 1864 Convention, but it was accepted as a temporary and exceptional measure which left the general treaty obligation unchanged.

(22) The purpose of paragraph 2 of draft conclusion 6 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3 (a) and (b). The Commission has recognized that subsequent practice under article 31, paragraph 3 (b) consists of any "conduct" in the application of a treaty, including under certain circumstances, inaction, which may contribute to establishing an agreement regarding the interpretation of the treaty.[576] Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, and may even include conduct by non-state actors which is attributable to one or more States parties and which fall within the scope of what the treaty conceives as forms of its application.[577] Thus, the individual conduct which may contribute to a subsequent practice under article 31, paragraph 3 (b), need not meet any particular formal criteria.[578]

(23) Subsequent practice at the international level need not necessarily be joint conduct.[579] A merely parallel conduct may suffice. It is a separate question whether parallel activity actually articulates a sufficient common understanding (agreement) regarding the interpretation of a treaty in a particular case (see below draft conclusion 9 paragraph (1)).[580] Subsequent agreements can be found in legally binding treaties as well as in non-binding instruments like memoranda of understanding.[581] Subsequent agreements can also be found in certain decisions of a Conference of States Parties (see below draft conclusion 10, paragraphs 1, 2 and 3).

(24) Paragraph 3 of this draft conclusion provides that in identifying subsequent practice under article 32, the interpreter is required to determine, whether, in particular, conduct by one or more parties is in the application of the treaty.[582] The Commission decided to treat such "other subsequent practice" (see draft conclusion 4, paragraph 3)[583] under article 32 in a separate paragraph for the sake of analytical clarity (see below draft conclusion 7 paragraph 2 and draft conclusion 8 paragraph 3), but it does not thereby call into question the unity of the process of interpretation. The considerations which are pertinent for the identification of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), also apply, *mutatis mutandis*, to the identification of "other subsequent

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[576] Commentary to draft conclusion 4, paras. 16–19, (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, chap. IV, sect. C.2).

[577] See, for example, commentary to draft conclusion 5, *Ibid.*, (A/68/10, chap. IV, sect. C.1 and sect. C.2); Boisson de Chazournes, *supra* note 543, pp. 54, 55 and 59–60; Gardiner, *supra* note 538, pp. 228–230; see also *Maritime Dispute (Peru v. Chile)*, I.C.J., Judgment of 27 January 2014, pp. 39–42, paras. 103–111 and pp. 45–46, paras. 119–122 and p. 47, para. 126; Dörr, *supra* note 539, pp. 555–556, para. 78.

[578] Gardiner, *supra* note 538, pp. 226–227.

[579] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6, at p. 33; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1213, para. 17 (Dissenting Opinion of Judge Parra-Aranguren).

[580] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 737, para. 258; but see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 84, para. 117 where the Court recognized concessions granted by the parties to the dispute as evidence of their tacit agreement; see also *Maritime Dispute (Peru v. Chile), I.C.J., Judgment of 27 January 2014.*

[581] Gardiner, *supra* note 538, pp. 475, 483.

[582] See above, paras. 1–4; Second Report, *supra* note 557, pp. 4–5, paras. 3–5.

[583] Report of the International Law Commission on its sixty-fifth session, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10). chap. IV, p. 17, para. 10.

practice" under article 32. Thus, agreements between less than all parties to a treaty regarding the interpretation of a treaty or its application are a form of subsequent practice under article 32.

(25) An example of a practical arrangement is the memorandum of understanding between the Department of Transportation of the United States of America and the Secretaría de Comunicaciones y Transportes of the United Mexican States on International Freight Cross-Border Trucking Services of 6 July 2011.[584] The memorandum of understanding does not refer to Canada, the third party of the North American Free Trade Agreement (NAFTA), and specifies that it "is without prejudice to the rights and obligations of the United States and Mexico under NAFTA". These circumstances suggest that the memorandum of understanding does not claim to constitute an agreement regarding the interpretation of NAFTA under article 31, paragraph 3 (a) or (b), but that it rather remains limited to being a practical arrangement between a limited number of parties which is subject to challenge by other parties or by a judicial or quasijudicial institution.

### Conclusion 7
### Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

### Commentary

(1) Draft conclusion 7 deals with the possible effects of subsequent agreements and subsequent practice on the interpretation of a treaty. The purpose is to indicate how subsequent agreements and subsequent practice may contribute to the clarification of the meaning of a treaty. Paragraph 1 emphasizes that subsequent agreements and subsequent practice must be seen in their interaction with other means of interpretation (see draft conclusion 1, paragraph 5).[585] They are therefore not necessarily in themselves conclusive.

(2) Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interactive process of interpretation of a treaty, which

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[584] J.R. Crook, *supra* note 570, pp. 809–812; see also: Mexico, Diario Oficial de la Federación (7 July 2011), *Decreto por el que se modifica el artículo 1 del diverso por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de los Estados Unidos de América.*

[585] Commentary to draft conclusion 1, paragraph 5, paras. 12–15 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10, chap IV.C.2), para. 39).

consists of placing appropriate emphasis in any particular case on the various means of interpretation in a "single combined operation".[586] The taking into account of subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 may thus contribute to a clarification of the meaning of a treaty[587] in the sense of a narrowing down (specifying) of possible meanings of a particular term or provision, or of the scope of the treaty as a whole (see paras. 4, 6–7, 10 and 11 below). Alternatively, such taking into account may contribute to a clarification in the sense of confirming a wider interpretation. Finally, it may contribute to understanding the range of possible interpretations available to the parties, including the scope for the exercise of discretion by the parties under the treaty (see paras. 12–15 below).

(3) International courts and tribunals usually begin their reasoning in a given case by determining the "ordinary meaning" of the terms of the treaty.[588] Subsequent agreements and subsequent practice mostly enter into their reasoning at a later stage when courts ask whether such conduct confirms or modifies the result arrived at by the initial interpretation of the ordinary meaning (or by other means of interpretation).[589] If the parties do not wish to convey the ordinary meaning of a term, but rather a special meaning in the sense of article 31 paragraph 4, subsequent agreements and subsequent practice may shed light on this special meaning. The following examples[590] illustrate how subsequent agreements and subsequent practice as means of interpretation can contribute, in their interaction with other means in the process of interpretation, to the clarification of the meaning of a treaty.

(4) Subsequent agreements and subsequent practice can help identify the "ordinary meaning" of a particular term by confirming a narrow interpretation of different possible shades of meaning of the term. This was the case, for example,[591] in the *Nuclear Weapons Advisory Opinion* where the International Court of Justice determined that the expressions "poison or poisonous weapons":

> have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This

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[586] Commentary to draft conclusion 1, paragraph 5, paras. 12–15 (*Ibid.*, para. 39).

[587] The terminology follows guideline 1.2 (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties: "Interpretative declaration" means a unilateral statement, whereby … [a State or an international organization] purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions) (see *Ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10/Add.1, chap. IV. F.2, guideline 1.2); see also *ibid.*, commentary to guideline 1.2, para. 18.

[588] Commentary to draft conclusion 1, paragraph 5, p. 18, para. 14 (*Ibid., Sixty-eighth Session* A/68/10, chap. IV.2, , para. 39); *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 8.

[589] See, for example, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 656, paras. 59–61 and p. 665, para. 80; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at p. 34, paras. 66–71; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 290 (Declaration of Judge *ad hoc* Guillaume).

[590] For more examples see "Second report of the ILC Study Group on Treaties over Time: jurisprudence under special regimes relating to subsequent agreements and subsequent practice", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 210–306.

[591] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67; *Competence of Assembly regarding Admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

> practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.[592]

(5) On the other hand, subsequent practice may prevent specifying the meaning of a general term to just one of different possible meanings.[593] For example, in the case of *U.S. Nationals in Morocco*, the Court stated:

> The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs ... have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner. In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the parties in this case.[594]

(6) Different forms of practice may contribute to both a narrow and a broad interpretation of different terms in the same treaty.[595]

(7) A treaty shall be interpreted in accordance with the ordinary meaning of its terms "in their context" (art. 31, para. 1). Subsequent agreements and subsequent practice, in interaction with this particular means of interpretation, may also contribute to identifying a narrower or broader interpretation of a term of a treaty.[596] In the *Intergovernmental Maritime Consultative Organization (IMCO) Advisory Opinion*, for example, the International Court of Justice had to determine the meaning of the expression "eight ... largest ship-owning nations" under article 28 (a) of the Convention on the International Maritime Organization (IMCO Convention). Since this concept of "largest ship-owning nations" permitted different interpretations (such as determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members under article 28 (a) itself, the Court turned to practice under other provisions in the Convention and held:

> This reliance upon registered tonnage in giving effect to different provisions of the Convention ... persuade[s] the Court to view that it is unlikely that when the latter article [article 28 (a)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest shipping owning nations.[597]

(8) Together with the text and the context, article 31, paragraph 1, accords importance to the "object and purpose" for its interpretation.[598] Subsequent agreements and subsequent

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[592] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, para. 55.

[593] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25.

[594] *Case concerning Rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

[595] See, *mutatis mutandis*, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, where the International Court of Justice interpreted the term "expenses" broadly and "action" narrowly in the light of the respective subsequent practice of the UN, at pp. 158–161 ("expenses") and pp. 164–165 ("action").

[596] See, for example, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 87, para. 40.

[597] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169; see also pp. 167–169; obiter: *Proceedings pursuant to the OSPAR Convention (Ireland-United Kingdom), Reports of International Arbitral Awards*, vol. XXIII, p. 59, at p. 99, para. 141.

[598] Gardiner, *supra* note 538, pp. 190 and 198.

practice may also contribute to a clarification of the object and purpose of a treaty,[599] or reconcile invocations of the "object and purpose" of a treaty with other means of interpretation.

(9) In the *Maritime Delimitation in the Area between Greenland and Jan Mayen*[600] and *Oil Platforms* cases,[601] for example, the International Court of Justice clarified the object and purpose of bilateral treaties by referring to subsequent practice of the parties. And in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court held:

> From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not, however, have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.[602]

(10) State practice other than in judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice only contribute to specifying the meaning of a term in the sense of narrowing the possible meanings of the rights and obligations under a treaty, but may also indicate a wider range of acceptable interpretations or a certain scope for the exercise of discretion which a treaty grants to States.[603]

(11) For example, whereas the ordinary meaning of the terms of article 5 of the 1944 Chicago Convention do not appear to require a charter flight to obtain permission to land while *en route*, long-standing State practice requiring such permission has led to general acceptance that this provision is to be interpreted as requiring permission.[604] Another case is

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[599] *Ibid*., pp. 191–194; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109; R. Higgins, "Some observations on the inter-temporal rule in international law", in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, J. Makarczyk, ed. (The Hague, Kluwer, 1996), p. 180; Distefano, *supra* note 538, pp. 52–54; Crema, *supra* note 568, p. 21.

[600] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 51, para. 27.

[601] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, paras. 27 and 30.

[602] See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67.

[603] This is not to suggest that there may ultimately be different interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts, see Gardiner, *supra* note 538, pp. 30–31 and p. 111, quoting the House of Lords in *R v. Secretary of State for the Home Department, ex parte Adan* [2001] AC 477: "It is necessary to determine the autonomous meaning of the relevant treaty provision … It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting State. In principle there can only be one true interpretation of a treaty … In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning", at pp. 515–517 (Lord Steyn).

[604] S.D. Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press,

article 22 (3) of the Vienna Convention on Diplomatic Relations which provides that the means of transport used by a mission shall be immune from search, requisition, attachment or execution. While police enforcement against diplomatic properties will usually be met with protests of States,[605] the towing of diplomatic cars that have violated local traffic and parking laws generally has been regarded as permissible in practice.[606] This practice suggests that, while punitive measures against diplomatic vehicles are forbidden, cars can be stopped or removed if they prove to be an immediate danger or obstacle for traffic and/or public safety.[607] In that sense, the meaning of the term "execution", and thus, the scope of protection accorded to means of transportation, is specified by the subsequent practice of parties.

(12) Another possible example concerns Article 12 of the Additional Protocol to the Geneva Conventions of 1949 (Protocol II) of 1977 which provides:

> Under the direction of the competent authority concerned, the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

Although the term "shall" suggests that it is obligatory for States to use the distinctive emblem for marking medical personnel and transports under all circumstances, subsequent practice suggests that States may possess some discretion with regard to its application.[608] As armed groups have in recent years specifically attacked medical convoys which were well recognizable due to the protective emblem, States have in certain situations refrained from marking such convoys with a distinctive emblem. Responding to a parliamentary question on its practice in Afghanistan, the Government of Germany has stated that:

> As other contributors of ISAF contingents, the Federal Armed Forces have experienced that marked medical vehicles have been targeted. Occasionally, these medical units and vehicles, clearly distinguished as such by their protective emblem, have even been preferred as targets. The Federal Armed Forces have

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2013), p. 85; A. Aust, *Modern Treaty Law and Practice*, 3rd ed. (Cambridge, Cambridge University Press, 2013), p. 215.

[605] E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford Commentaries on International Law, 3rd ed. (Oxford, Oxford University Press, 2008), pp. 160–161; J. Salmon, *Manuel de droit diplomatique* (Brussels, Bruylant, 1994), p. 208, para. 315.

[606] See, for example, Australia, Department of Foreign Affairs and Trade, *Privileges and Immunities of Foreign Representatives* (www.dfat.gov.au/protocol/Protocol_Guidelines/A21.pdf); Iceland, Protocol Department Ministry of Foreign Affairs, *Diplomatic Handbook*, p. 14 (www.mfa.is/media/PDF/Diplomatic_Handbook.PDF); United Kingdom, see the statement of the Parliamentary Under-Secretary of State, Home Office (Lord Elton) in the House of Lords, HL Deb, 12 December 1983 vol. 446 cc3-4; United States, see *American Journal of International Law*, vol. ii, 1994, pp. 312–313.

[607] Denza, *supra* note 605, p. 160; M. Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis*, 2nd ed. (Nomos, 2010), p. 70.

[608] Y. Sandoz, C. Swinarski and B. Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht, International Committee of the Red Cross and Martinus Nijhoff, 1987), p. 1440, paras. 4742–4744; H. Spieker, "Medical transportation", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 7–12; see also the less stringent future tense in the French version "sera arboré".

thus, alongside with Belgium, France, the UK, Canada and the US, decided within ISAF to cover-up the protective emblem on medical vehicles.[609]

(13) Such practice by States may confirm an interpretation of article 12 according to which the obligation to use the protective emblem[610] under exceptional circumstances allows a margin of discretion for the parties.

(14) A treaty provision which grants States an apparently unconditional right may raise the question of whether this discretion is limited by the purpose of the rule. For example, according to article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may notify the sending State, without having to give reasons, that a member of the mission is *persona non grata*. States mostly issue such notifications in cases in which members of the mission were found or suspected of having engaged in espionage activities, or having committed other serious violations of the law of the receiving State, or caused significant political irritation.[611] However, States have also made such declarations in other circumstances, such as when envoys caused serious injury to a third party[612] or committed repeated infringement of the law,[613] or even to enforce their drunk-driving laws.[614] It is even conceivable that declarations are made without clear reasons or for purely political motives. Other States do not seem to have asserted that such practice constitutes an abuse of the power to declare members of a mission as *personae non gratae*. Thus, such practice confirms that article 9 provides an unconditional right.[615]

(15) Paragraph 2 of draft conclusion 7 concerns possible effects of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3), which does not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, can confirm the interpretation which the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a

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[609] Deutscher Bundestag, "Antwort der Bundesregierung: Rechtlicher Status des Sanitätspersonals der Bundeswehr in Afghanistan", 9 April 2010, Bundestagsdrucksache 17/1338, p. 2 (translation by the Special Rapporteur).

[610] Spieker, *supra* note 608, para. 12.

[611] See Denza, *supra* note 605, pp. 77–88 with further references to declarations in relation to espionage; see also Salmon, *supra* note 605, p. 484 para. 630; and Richtsteig, *supra* note 607, p. 30.

[612] The Netherlands, Protocol Department, Ministry of Foreign Affairs, Protocol Guide for Diplomatic Missions and Consular Posts. Available from www.government.nl/issues/staff-of-foreign-missions-and-international-organisations/documents-and-publications/leaflets/2013/01/21/protocol-guide-for-diplomatic-missions-en-consular-posts-january-2013.html.

[613] France, Ministère des affaires étrangères et du développement, Guide for foreign diplomats serving in France: Immunities – Respect for local laws and regulations (www.diplomatie.gouv.fr/en/ministry/guide-for-foreign-diplomats/immunities/article/respect-for-local-laws-and); Turkey, Ministry of Foreign Affairs, Traffic regulations to be followed by foreign missions in Turkey, Principal Circular Note, 63552 Traffic Regulations 2005/PDGY/63552 (6 April 2005) (http://www.mfa.gov.tr/06_04_2005--63552-traffic-regulations.en.mfa); United Kingdom, Foreign and Commonwealth Office, Circular dated 19 April 1985 to the Heads of Diplomatic Missions in London, reprinted in G. Marston, "United Kingdom materials on international law 1985", *British Yearbook of International Law*, vol. 56, No. 1 (1985), p. 437.

[614] See Canada, Foreign Affairs, Trade and Development, Revised Impaired Driving Policy (www.international.gc.ca/protocol-protocole/vienna-vienne/idp/index.aspx?view=d); United States, Department of State, *Diplomatic Note 10-181 of the Department of State* (24 September 2010), www.state.gov/documents/organization/149985.pdf, pp. 8–9.

[615] See G. Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 112, for an even more far-reaching case under article 9 of the Vienna Convention on Diplomatic Relations.

result which is manifestly absurd or unreasonable. Article 32 thereby makes a distinction between a use of preparatory work or of "other subsequent practice" to confirm a meaning arrived at under article 31, and its use to "determine" the meaning. Hence, recourse may be had to "other subsequent practice" under article 32 not only to determine the meaning of the treaty in certain circumstances, but also — and always — to confirm the meaning resulting from the application of article 31.[616]

(16) Subsequent practice under article 32, can contribute, for example, to reducing possible conflicts when the "object and purpose" of a treaty appears to be in tension with specific purposes of certain of its rules.[617] In the *Kasikili/Sedudu Island* case, for example, the International Court of Justice emphasized that the parties to the 1890 Treaty "sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence."[618] The parties thereby reconciled a possible tension by taking into account a certain subsequent practice by only one of the parties as a supplementary means of interpretation (under article 32).[619]

(17) Another example of "other subsequent practice" under article 32 concerns the term "feasible precautions" in article 57, paragraph (2) (ii), of the Additional Protocol to the Geneva Conventions of 1949 (Protocol I) of 1977. This term has been used in effect by article 3 (4) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) of 10 October 1980, which provides that "[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." This language has come to be accepted by way of subsequent practice in many military manuals as a general definition of "feasible precautions" for the purpose of article 57, paragraph (2) (ii), of Protocol I of 1977.[620]

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[616] WTO Appellate Body China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R para. 403 (2009); "Although the Panel's application of Article 31 of the Vienna Convention to 'Sound recording distribution services' led it to a 'preliminary conclusion' as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to confirm that meaning. We note, in this regard, that China's argument on appeal appears to assume that the Panel's analysis under Article 32 of the Vienna Convention would necessarily have been different if the Panel had found that the application of Article 31 left the meaning of 'Sound recording distribution services' ambiguous or obscure, and if the Panel had, therefore, resorted to Article 32 to determine, rather than to confirm, the meaning of that term. We do not share this view. The elements to be examined under Article 32 are distinct from those to be analyzed under Article 31, but it is the same elements that are examined under Article 32 irrespective of the outcome of the Article 31 analysis. Instead, what may differ, depending on the results of the application of Article 31, is the weight that will be attributed to the elements analyzed under Article 32", see also M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), p. 447, para 11.

[617] See World Trade Organization, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — AB-1998-4*, report of the Appellate Body of 12 October 1998 (World Trade Organization, document WT/DS58/AB/R), para. 17 ("most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes"); Gardiner, *supra* note 538, p. 195.

[618] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1074, para. 45.

[619] *Ibid.*, at p. 1078, para. 55 and p. 1096, para. 80.

[620] For the military manuals of Argentina (1989), Canada (2001) and the United Kingdom (2004), see Henckaerts and Doswald-Beck, *Practice*, *supra* note 565, pp. 359–360, paras. 160–164 and the online update for the military manual of Australia (2006) (http://www.icrc.org/customary-ihl/eng/docs/

(18) Paragraph 3 of draft conclusion 7 addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation under article 31, paragraph 3 (a) and (b). The paragraph reminds the interpreter that agreements subsequently arrived at may serve to amend or modify a treaty, but that such subsequent agreements are subject to article 39 of the Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3 (a). The second sentence, while acknowledging that there are examples to the contrary in case-law and diverging opinions in the literature, stipulates that the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.

(19) According to article 39 of the Vienna Convention on the Law of Treaties "[a] treaty may be amended by agreement between the parties". Article 31, paragraph 3 (a), on the other hand, refers to subsequent agreements "between the parties regarding the interpretation of the treaty and the application of its provisions", and does not seem to address the question of amendment or modification. As the WTO Appellate Body has held:

> […] the term "application" in article 31 (3) (a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied"; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation ...[621]

(20) Articles 31, paragraph 3 (a), and 39, if read together, demonstrate that agreements which the parties reach subsequently to the conclusion of a treaty can interpret and amend or modify the treaty.[622] An agreement under article 39 need not display the same form as the treaty which it amends.[623] As the International Court of Justice has held in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case:

> Whatever its specific designation and in whatever instrument it may have been recorded (the [River Uruguay Executive Commission] CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement.[624]

(21) It is often difficult to draw a distinction between agreements of the parties under a specific treaty provision which attributes binding force to subsequent agreements, simple subsequent agreements under article 31, paragraph 3 (a), which are not binding as such, and, finally, agreements on the amendment or modification of a treaty under articles 39–41.[625] International case-law and State practice suggest[626] that informal agreements which

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v2_rul_rule15_sectionc); see also Y. Sandoz, C. Swinarski and B. Zimmermann, *supra* note 608, p. 683, para. 2202.

[621] WTO, Appellate Body Report, EC – *Bananas* III, Second Recourse to article 21.5, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008, paras. 391–393.

[622] Murphy, *supra* note 604, p. 88.

[623] Sinclair, *supra* note 538, p. 107 with reference to Waldock, *Official Records of the United Nations Conference on the Law of Treaties*, *supra* note 540, p. 207, paras. 49–52; Villiger, *supra* note 616, p. 513, paras. 7, 9 and 11; Odendahl, "Article 39. General rule regarding the amendment of treaties", in *Vienna Convention on the Law of Treaties – A Commentary*, O. Dörr and K. Schmalenbach, eds. (Springer, 2012), p. 706, at para. 16.

[624] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 62–63, paras. 128 and 131; the Court then concluded that, in the case under review, that these conditions had not been fulfilled, at pp. 62–66, paras. 128–142.

[625] In judicial practice it is sometimes not necessary to determine whether an agreement has the effect of interpreting or modifying a treaty, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad),*

are alleged to derogate from treaty obligations should be narrowly interpreted. There do not seem to be any formal criteria other than those set forth in article 39, if applicable, apart from the ones which may be provided for in the applicable treaty itself, which are recognized as distinguishing these different forms of subsequent agreements. It is clear, however, that States and international courts are generally prepared to accord States parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty. The recognition of this scope for the interpretation of a treaty goes hand in hand with the reluctance by States and courts to recognize that an agreement actually has the effect of amending or modifying a treaty.[627] An agreement to modify a treaty is thus not excluded, but also not to be presumed.[628]

(22) Turning to the question whether the parties can amend or modify a treaty by a common subsequent practice, the Commission originally proposed, in its *Draft Articles on the Law of Treaties*, to include the following provision in the Vienna Convention which would have explicitly recognized the possibility of a modification of treaties by subsequent practice:

> Draft Article 38: Modification of treaties by subsequent practice
>
> A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.[629]

(23) This draft article gave rise to an intense debate at the Vienna Conference.[630] An amendment to delete draft article 38 was put to a vote and was adopted by 53 votes to 15, with 26 abstentions. After the Vienna Conference, the question was discussed whether the rejection of draft article 38 at the Vienna Conference meant that the possibility of a modification of a treaty by subsequent practice of the parties had thereby been excluded. Many writers came to the conclusion that the negotiating States simply did not wish to address this question in the Convention and that treaties can, as a general rule under the customary law of treaties, indeed be modified by subsequent practice which establishes the agreement of the parties to that effect.[631] International courts and tribunals, on the other

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*Judgment, I.C.J. Reports 1994*, p. 6, at p. 29, para. 60 ("in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration"); it is sometimes considered that an agreement under article 31 (3) (a) can also have the effect of modifying a treaty, Aust, *supra* note 604, pp. 212–214 with examples.

[626] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 63, paras. 131 and 140; Crawford, *supra* note 570, p. 32; Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. the United States of America*, Iran-USCTR vol. 38 (2004–2009), p. 77, at pp. 125–126, para. 132; *ADF Group Inc. v. United States of America* (Case No. ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, pp. 84–85, para. 177 (www.state.gov/documents/organization/16586.pdf); *Ibid.*, Part IV, Chapter C, paras. 20–21; Second Report, *supra* note 557, p. 61–68, paras. 146–165.

[627] It may be that States, in diplomatic contexts outside court proceedings, tend to acknowledge more openly that a certain agreement or common practice amounts to a modification of a treaty, see Murphy, *supra* note 604, p. 83.

[628] *Ibid.*, p. 66, para. 140; Crawford, *supra* note 570, p. 32.

[629] *Yearbook of the International Law Commission, 1966*, vol. II, p. 236.

[630] *Official Records of the United Nations Conference on the Law of Treaties*, *supra* note 540, pp. 208–214; Second Report, *supra* note 557, p. 52–53, paras. 119–121; Distefano, *supra* note 538, pp. 56–61.

[631] Sinclair, *supra* note 538, p. 138; Gardiner, *supra* note 538, pp. 243–245; Yasseen, *supra* note 538, pp. 51–52; M. Kamto, "La volonté de l'État en droit international", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 310 (2004), pp. 134–141, at p. 134; Aust, *supra* note 604, p. 213; Villiger, *supra* note 616, p. 432, para. 23; Dörr, *supra* note 539, p. 555, para. 76 (in accord Odendahl,

hand, have since the adoption of the Vienna Convention mostly refrained from recognizing this possibility.

(24) In the case concerning the *Dispute regarding Navigational and Related Rights*, the International Court of Justice has held that "subsequent practice of the parties, within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement".[632] It is not entirely clear whether the Court thereby wanted to recognize that subsequent practice under article 31, paragraph 3 (b), may also have the effect of amending or modifying a treaty, or whether it was merely making a point relating to the interpretation of treaties as the "original" intent of the parties is not necessarily conclusive for the interpretation of a treaty. Indeed, the Commission recognized in provisionally adopted draft conclusion 3 that subsequent agreements and subsequent practice, like other means of interpretation, "may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time".[633] The scope for "interpretation" is therefore not necessarily determined by a fixed "original intent", but must rather be determined by taking into account a broader range of considerations, including certain later developments. This somewhat ambiguous dictum of the International Court raises the question of how far subsequent practice under article 31, paragraph 3 (b), can contribute to "interpretation", and whether subsequent practice may have the effect of amending or modifying a treaty. Indeed, the dividing line between the interpretation and the amendment or modification of a treaty is in practice sometimes "difficult, if not impossible, to fix".[634]

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*supra* note 623, p. 702, paras. 10–11); Distefano, *supra* note 538, pp. 62–67; H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989: supplement, 2006 – part three", *British Yearbook of International Law*, vol. 77, No. 1 (2006), p. 65; M.N. Shaw, *International Law*, 6th ed. (Cambridge, Cambridge University Press, 2003), p. 934; I. Buga, "Subsequent practice and treaty modification", in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, M.J. Bowman and D. Kritsiotis, eds. (forthcoming), at note 65 with further references; disagreeing with this view, in particular, and stressing the solemnity of the conclusion of a treaty in contrast to the informality of practice Murphy, *supra* note 604, pp. 89–90; see also Hafner, *supra* note 615, pp. 115–117 (differentiating between the perspectives of courts and States, as well as emphasizing the importance of amendment provisions in this context).

[632] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 242, para. 64; see also *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 231, at p. 256, para. 62; Yasseen, *supra* note 538, p. 51; Kamto, *supra* note 631, pp. 134–141; R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge*, (Heymann, 1963), p. 132.

[633] Draft conclusion 3, (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* A/68/10, chap. IV.C.1) and commentary to draft conclusion 3, paras. 1–18 (*ibid.*, chap. IV.C.2).

[634] Sinclair, *supra* note 538, p. 138; Gardiner, *supra* note 538, p. 243; Murphy, *supra* note 604, p. 90; B. Simma, "Miscellaneous thoughts on subsequent agreements and practice", in Treaties and Subsequent Practice, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 46; Karl, *supra* note 539, pp. 42–43; J.-M. Sorel and V. Boré Eveno, "Article 31: Convention of 1969", *The Vienna Conventions on the Law of Treaties – A Commentary*, in O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), p. 825, para. 42; Dörr, *supra* note 539, p. 555, para. 76; this is true even if the two processes can theoretically be seen as being "legally quite distinct", see the Dissenting Opinion of Judge Parra-Aranguren in *Kasikili/Sedudu Island (Botswana/Nambia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1212–1213, para. 16; similarly Hafner, *supra* note 615, p. 114; Linderfalk, *supra* note 539, p. 168.

(25) Apart from the dictum in *Dispute regarding Navigational and Related Rights*,[635] the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. This is true, in particular, for the *Namibia Advisory Opinion* as well as for the *Wall Advisory Opinion* in which the Court recognized that subsequent practice had an important effect on the determination of the meaning of the treaty, but stopped short of explicitly recognizing that such practice had led to an amendment or modification of the treaty.[636] Since these opinions concerned treaties establishing an international organization it seems difficult to derive a general rule of the law of treaties from them. The questions of subsequent agreements and subsequent practice relating to international organizations will be the subject of a later report.[637]

(26) Other important cases in which the International Court of Justice has raised the issue of possible modification by the subsequent practice of the parties concern boundary treaties. As the Court said in the case concerning *the Land and Maritime Boundary between Cameroon and Nigeria*:

> "Here the conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law."[638]

(27) The Court found such acquiescence in the case concerning the *Temple of Preah Vihear*, where it placed decisive emphasis on the fact that there had been clear assertions of sovereignty by one side (France) which, according to the Court, required a reaction on the part of the other side (Thailand).[639] This judgment, however, was rendered before the adoption of the Vienna Convention and thus, at least implicitly, was taken into account by States in their debate at the Vienna Conference.[640] The judgment also stops short of explicitly recognizing the modification of a treaty by subsequent practice as the Court left open whether the line on the French map was compatible with the watershed line that had been agreed upon in the original boundary treaty between the two States – although it is often assumed that this was not the case.[641]

(28) Thus, while leaving open the possibility that a treaty might be modified by the subsequent practice of the parties, the International Court of Justice has so far not explicitly

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[635] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 242, para. 64.

[636] Thirlway, *supra* note 631, p. 64.

[637] See already *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* A/67/10, p. 124, para. 238, and, *Ibid., Sixty-third Session, Supplement No. 10*, A/63/10, annex A, p. 383, para. 42.

[638] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[639] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6, at p. 30: "an acknowledgement by conduct was undoubtedly made in a very definite way ... it is clear that the circumstances were such as called for some reaction"; "a clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined" and therefore "demanded a reaction".

[640] M. Kohen, "Uti possidetis, prescription et pratique subséquente à un traité dans l'affaire de l'île de Kasikili/Sedudu devant la Cour internationale de Justice", *German Yearbook of International Law*, vol. 43 (2000), p. 272.

[641] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 26: "a fact, which if true, must have been no less evident in 1908". Judge Parra-Aranguren has opined that the *Temple* case demonstrated "that the effect of subsequent practice on that occasion was to amend the treaty", *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1212–1213, para. 16 (Dissenting Opinion of Judge Parra-Aranguren); Buga, *supra* note 631, at note 113.

recognized that such an effect has actually been produced in a specific case. Rather the Court has reached interpretations which were difficult to reconcile with the ordinary meaning of the text of the treaty, but which coincided with the identified practice of the parties.[642] Contrary holdings by arbitral tribunals have been characterized either as an "isolated exception"[643] or rendered before the Vienna Conference and critically referred to there.[644]

(29) The WTO Appellate Body has made clear that it would not accept an interpretation which would result in a modification of a treaty obligation, as this would not be an "application" of an existing treaty provision.[645] The Appellate Body's position may be influenced by article 3.2. of the Dispute Settlement Understanding, according to which "[r]ecommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements".[646]

(30) The European Court of Human Rights occasionally has recognized the subsequent practice of the parties as a possible source for a modification of the Convention. In an obiter dictum in the 1989 case of *Soering v. the United Kingdom*, the Court held

> that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of article 3 (*ibid*., pp. 40–41, § 103).[647]

(31) Applying this reasoning, the Court came to the following conclusion in *Al-Saadoon and Mufdhi v. the United Kingdom*:

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[642] In particular the Namibia opinion has been read as implying that subsequent practice has modified article 27 paragraph 3 of the Charter of the United Nations, Alain Pellet, Article 38, in The Statute of the International Court of Justice A Commentary, A. Zimmermann *et al.*, ed. 2nd ed. (Oxford, Oxford University Press), 2012), p. 844, para. 279; cf. Second Report, *supra* note 557, pp. 53–54, paras. 124–126.

[643] M. Kohen, "Keeping subsequent agreements and practice in their right limits", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 43 regarding *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 13 April 2002, *Reports of International Arbitral Awards*, vol. XXV, p. 83, at pp. 110–111, paras. 3.6–3.10; see also *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 29 September 1988, *Reports of International Arbitral Awards*, vol. XX, p.1, at p. 56, paras. 209 and 210 in which the Arbitral Tribunal held, in an obiter dictum, "that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected"; but see R. Kolb, "La modification d'un traité par la pratique subséquente des parties", *Revue suisse de droit international et européen*, vol. 14, 2004, p. 20.

[644] *Interpretation of the Air Transport Services Agreement between the United States of America and France*, 22 December 1963, *Reports of International Arbitral Awards*, vol. XVI, p. 5, at pp. 62–63; *Official Records of the United Nations Conference on the Law of Treaties*, *supra* note 540, p. 208, para. 58 (Japan); Murphy, *supra* note 604, p. 89.

[645] WTO, Appellate Body Report, *EC – Bananas III*, Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008, paras. 391–393.

[646] Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, 1994, ILM, vol. 33 (1994) 1144.

[647] *Al-Saadoon and Mufdhi v. the United Kingdom, Judgment*, 2 March 2010, Application No. 61498/08, ECHR 2010, para. 119, referring to *Öcalan v. Turkey* [GC], 12 May 2005, Application No. 46221/99, ECHR 2005-IV.

> "All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words 'inhuman or degrading treatment or punishment' in Article 3 as including the death penalty (cf. Soering, cited above, §§ 102–104)."[648]

(32) The case-law of international courts and tribunals allows the following conclusions: The WTO situation suggests that a treaty may preclude the subsequent practice of the parties from having a modifying effect. Thus, the treaty itself governs the question in the first place. Conversely, the European Court of Human Rights cases suggest that a treaty may permit the subsequent practice of the parties to have a modifying effect. Thus, ultimately much depends on the treaty or of the treaty provisions concerned.[649]

(33) The situation is more complicated in the case of treaties for which such indications do not exist. No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice. The conclusion can be drawn, however, that the Court, while finding that the possibility of a modification of a treaty by subsequent practice of the parties "cannot be wholly precluded as a possibility in law",[650] considered that finding such a modification should be avoided, if at all possible. Instead the Court prefers to accept broad interpretations which may stretch the ordinary meaning of the terms of the treaty.

(34) This conclusion from the jurisprudence of the International Court of Justice is in line with certain considerations that were articulated during the debates among States on draft article 38 of the Vienna Convention.[651] Today, the consideration that amendment procedures which are provided for in a treaty are not to be circumvented by informal means seems to have gained more weight in relation to the equally true general observation that international law is often not as formalist as national law.[652] The concern which was expressed by a number of States at the Vienna Conference, according to which the possibility of modifying a treaty by subsequent practice could create difficulties for domestic constitutional law, has also since gained in relevance.[653] And, while the principle *pacta sunt servanda* is not formally called into question by an amendment or modification of a treaty by subsequent practice that establishes the agreement of all the parties, it is

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[648] *Ibid.*, para. 120; B. Malkani, "The obligation to refrain from assisting the use of the death penalty", *International and Comparative Law Quarterly*, vol. 62, No. 3 (2013), p. 523.

[649] Buga, *supra* note 631, at notes 126–132.

[650] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[651] Second Report, *supra* note 557, p. 52–53, paras. 119–121.

[652] Murphy, *supra* note 604, p. 89; Simma, *supra* note 634, p. 47; Hafner, *supra* note 615, pp. 115–117; J.E. Alvarez, "Limits of change by way of subsequent agreements and practice", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 130.

[653] See *NATO Strategic Concept Case*, German Federal Constitutional Court, Judgment of 19 June 2001, Application 2 BvE 6/99 (English translation available from www.bundesverfassungsgericht.de/entscheidungen/es20011122_2bve000699en.html), paras. 19–21; S. Kadelbach, "Domestic constitutional concerns with respect to the use of subsequent agreements and practice at the international level", pp. 145–148; Alvarez, *supra* note 652, p. 130; I. Wuerth, "Treaty interpretation, subsequent agreements and practice, and domestic constitutions", pp. 154–159; and H. Ruiz Fabri, "Subsequent practice, domestic separation of powers, and concerns of legitimacy", pp. 165–166, all in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013).

equally true that the stability of treaty relations may be called into question if an informal means of identifying agreement as subsequent practice could easily modify a treaty.[654]

(35) In conclusion, while there exists some support in international case-law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts prefer to make every effort to conceive of an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way. Such efforts to interpret a treaty broadly are possible since article 31 of the Vienna Convention does not accord primacy to one particular means of interpretation contained therein, but rather requires the interpreter to take into account all means of interpretation as appropriate.[655] In this context an important consideration is how far an evolutive interpretation of the treaty provision concerned is possible.[656]

### Conclusion 8
### Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

### Commentary

(1) Draft conclusion 8 identifies some criteria that may be helpful for determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. Naturally, the weight accorded to subsequent agreements or subsequent practice must also be determined in relation to other means of interpretation (see draft conclusion 1, paragraph 5).

(2) Paragraph 1 addresses the weight of a subsequent agreement or subsequent practice under article 31, paragraph 3, thus dealing with both subparagraphs (a) and (b) from a general point of view. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depends, *inter alia*, on its clarity and specificity. The use of the term "*inter alia*" indicates that these criteria should not be seen as exhaustive. Other criteria may relate to the time when the agreement or

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[654] See, for example, Kohen, *supra* note 640, p. 274 (in particular with respect to boundary treaties).

[655] Draft conclusion 1, para. 5, and accompanying commentary (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* A/68/10, chap. IV, sect. C.1 and sect. C.2); Hafner, *supra* note 615, p. 117; some authors support the view that the range of what is conceivable as an "interpretation" is wider in case of a subsequent agreement or subsequent practice under article 31, paragraph 3, than in the case of interpretations by other means of interpretation, including the range for evolutive interpretations by courts or tribunals, for example, Gardiner, *supra* note 538, p. 243; Dörr, *supra* note 539, p. 555, para. 76.

[656] In the case concerning the *Dispute regarding Navigational and Related Rights*, for example, the International Court of Justice could leave the question open whether the term "comercio" had been modified by the subsequent practice of the parties since it decided that it was possible to give this term an evolutive interpretation. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 242–243, paras. 64–66.

practice occurred,[657] the emphasis given by the parties to a particular agreement or practice, or the applicable burden of proof.

(3) The interpretative weight of subsequent agreements or practice in relation to other means of interpretation often depends on their specificity in relation to the treaty concerned.[658] This is confirmed, for example, by decisions of the International Court of Justice, arbitral awards and reports of the World Trade Organization (WTO) Panels and Appellate Body.[659] The award of the International Centre for Settlement of Investment Disputes (ICSID) tribunal in *Plama v. Bulgaria* is instructive:

> "It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria-Cyprus BIT in 1987. In the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions (...). It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs."[660]

(4) Whereas the International Court of Justice and arbitral tribunals tend to accord more interpretative weight to rather specific subsequent practice by States, the European Court of Human Rights often relies on broad comparative assessments of the domestic legislation or international positions adopted by States.[661] In this latter context, it should be borne in mind that the rights and obligations under human rights treaties must be correctly transformed, within the given margin of appreciation, into the law, the executive practice and international arrangements of the respective State party. For this purpose, sufficiently strong commonalities in the national legislation of States parties can be relevant for the determination of the scope of a human right or the necessity of its restriction. In addition, the character of certain rights or obligations sometimes speaks in favour of taking less

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[657] In the case concerning the *Maritime Dispute (Peru v. Chile)*, the Court privileged the practice that was closer to the date of entry into force, *Maritime Dispute (Peru v. Chile), I.C.J.*, Judgment of 27 January 2014. Available from www.icj-cij.org/docket/files/137/17930.pdf, p. 47, para. 126.

[658] Murphy, *supra* note 604, p. 91.

[659] See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 55, para. 38; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 231, at p. 259, para. 74; WTO, Panel Report, *US – Continued Zeroing*, WT/DS350/R, 1 October 2008 WTO, Appellate Body Report, *US – Upland Cotton*, WT/DS267/AB/R, 3 March 2005, para. 625.

[660] *Plama Consortium Limited v. Republic of Bulgaria* (Cyprus/Bulgaria BIT), Decision on Jurisdiction, ICSID Case No. ARB/03/24 (ECT) (8 February 2005), *ICSID Review – Foreign Investment Law Journal*, vol. 20 (2005), p. 262, at pp. 323–324, para. 195.

[661] See, for example, *Cossey v. the United Kingdom, Judgment*, 27 September 1990, Application No. 10843/84, ECHR Series A, No. 184, para. 40; *Tyrer v. the United Kingdom, Judgment*, 25 April 1978, Application No. 5856/72, ECHR Series A, No. 26, para. 31; *Norris v. Ireland, Judgment*, 26 October 1988, Application No. 10581/83, ECHR Series A, No. 142, para. 46.

specific practice into account. For example, in the case of *Rantsev v. Cyprus* the Court held that:

> "it is clear from the provisions of these two [international] instruments that the Contracting States ... have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking (...). Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 [prohibition of forced labour] must be considered within this broader context."[662]

(5) On the other hand, in the case of *Chapman v. the United Kingdom*, the Court observed "that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (...),"[663] but ultimately said that it was "not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation."[664]

(6) Paragraph 2 of draft conclusion 8 deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that the weight of subsequent practice also depends on whether and how it is repeated. This formula "whether and how it is repeated" brings in the elements of time and the character of a repetition. It indicates, for example, that, depending on the treaty concerned, something more than just a technical or unmindful repetition of a practice may contribute to its interpretative value in the context of article 31, paragraph 3 (b). The element of time and the character of the repetition also serves to indicate the "grounding" of a particular position of the parties regarding the interpretation of a treaty. Moreover, the non-implementation of a subsequent agreement may also suggest a lack of its weight as a means of interpretation under article 31, paragraph 3 (a).[665]

(7) The question of whether "subsequent practice" under article 31, paragraph 3 (b),[666] requires more than a one-off application of the treaty was addressed by the WTO Appellate Body in *Japan – Alcoholic Beverages II*:

> "Subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation."[667]

(8) This definition suggests that subsequent practice under article 31, paragraph 3 (b), requires more than one "act or pronouncement" regarding the interpretation of a treaty, but rather action of such frequency and uniformity that it warrants a conclusion that the parties have reached a settled agreement regarding the interpretation of the treaty. Such a threshold would imply that subsequent practice under article 31, paragraph 3 (b), requires a broad-

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[662] *Rantsev v. Cyprus and Russia, Judgment*, 7 January 2010, Application No. 25965/04, ECHR 2010, para. 285; see also paras. 273–274.

[663] *Chapman v. the United Kingdom* [GC], *Judgment*, 18 January 2001, Application No. 27238/95, ECHR 2001-I, para. 93.

[664] *Ibid.*, para. 94.

[665] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 63, para. 131.

[666] Draft conclusion 4, para. 2 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, chap. IV.C.1).

[667] WTO, Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, sect. E, pp. 12–13.

based, settled, and qualified form of collective practice in order to establish agreement among the parties regarding interpretation.

(9) The International Court of Justice, on the other hand, has applied article 31, paragraph 3 (b), more flexibly, without adding further conditions. This is true, in particular, for its judgment in the case of *Kasikili/Sedudu Island*.[668] Other international courts have mostly followed the approach of the International Court of Justice. This is true for the Iran-United States Claims Tribunal[669] and the European Court of Human Rights.[670]

(10) The difference between the standard formulated by the WTO Appellate Body, on the one hand, and the approach of the International Court of Justice, on the other, is, however, more apparent than real. The WTO Appellate Body seems to have taken the "concordant, common and consistent" formula from a publication[671] which stated that "the value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent."[672] The formula "concordant, common and consistent" thus provides an indication as to the circumstances under which subsequent practice under article 31, paragraph 3 (b) has more or less weight as a means of interpretation in a process of interpretation, rather than require any particular frequency in the practice.[673] The WTO Appellate Body itself on occasion has relied on this nuanced view.[674]

(11) The Commission, while finding that the formula "concordant, common and consistent" may be useful for determining the weight of subsequent practice in a particular case, also considers it as not being sufficiently well-established to articulate a minimum threshold for the applicability of article 31, paragraph 3 (b), and as carrying the risk of

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[668] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1075–1076, paras. 47–50 and p. 1087, para. 63; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at pp. 34–37, paras. 66–71.

[669] Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. the United States of America*, Iran-USCTR vol. 38 (2004–2009), p. 77, at pp. 116–126, paras. 109–133.

[670] *Soering*, *supra* note 558, para. 103; *Loizidou v. Turkey (Preliminary Objections), Judgment*, 23 March 1995, Application No. 15318/89, ECHR, Series A No. 310, paras. 73 and 79–82; *Bankovic*, *supra* note 561, paras. 56 and 62; concerning the jurisprudence of ICSID tribunals see O.K. Fauchald, "The legal reasoning of ICSID tribunals: an empirical analysis", *European Journal of International Law*, vol. 19, No. 2 (2008), p. 345; see also A. Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States", *American Journal of International Law*, vol. 104, 2010, pp. 207–215.

[671] I. Sinclair, *supra* note 538, p. 137; see also Yasseen, *supra* note 538, pp. 48–49; whilst "commune" is taken from the work of the International Law Commission, "d'une certaine constance" and "concordante" are conditions which Yasseen derives through further reasoning; see *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), pp. 98–99, paras. 17–18 and p. 221, para. 15.

[672] I. Sinclair, *supra* note 538, p. 137; Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. the United States of America*, Iran-USCTR, vol. 38 (2004–2009), p. 77, at p. 118, para. 114.

[673] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 53, at p. 187, para. 169; J.-P Cot, "La conduite subséquente des parties a un traité", *Revue générale de droit international public*, vol. 70, 1966, pp. 644–647 ("valeur probatoire"); Distefano, *supra* note 538, p. 46; Dörr, *supra* note 539, p. 556, para. 79; see also the oral argument before the International Court of Justice in *Maritime Dispute (Peru v. Chile)*, CR 2012/33, pp. 32–36, paras. 7–19 (Wood), available from www.icj-cij.org/docket/files/137/17218.pdf and CR 2012/36, pp. 13–18, paras. 6–21 (Wordsworth), available from www.icj-cij.org/docket/files/137/17234.pdf.

[674] WTO, Appellate Body Report, *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, para. 93.

being misconceived as overly prescriptive. Ultimately, the Commission continues to find that "the value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms."[675] This implies that a one-off practice of the parties which establishes their agreement regarding the interpretation needs to be taken into account under article 31, paragraph 3 (b).[676]

(12) Paragraph 3 of draft conclusion 8 addresses the weight that should be accorded to "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3). It does not address when and under which circumstances such practice can be considered. The WTO Appellate Body has emphasized, in a comparable situation, that those two issues must be distinguished from each other:

> "We consider that the European Communities conflates the preliminary question of what may qualify as a 'circumstance' of a treaty's conclusion with the separate question of ascertaining the degree of relevance that may be ascribed to a given circumstance, for purposes of interpretation under Article 32."[677]

The Appellate Body also held that:

> "first, the Panel did not examine the classification practice in the European Communities during the Uruguay Round negotiations as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention; and, second, the value of the classification practice as a supplementary means of interpretation ...".[678]

In order to determine the "relevance" of such subsequent practice, the Appellate Body referred to "objective factors":

> "These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty (…)."[679]

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[675] *Yearbook of the International Law Commission, 1966*, vol. II, p. 222, para. 15; Cot, *supra* note 673, p. 652.

[676] In practice, a one-off practice will often not be sufficient to establish an agreement of the parties regarding a treaty's interpretation, as a general rule, however, subsequent practice under article 31, paragraph 3 (b), does not require any repetition but only an agreement regarding the interpretation. The likelihood of an agreement established by an one-off practice thus depends on the act and the treaty in question, see E. Lauterpacht, "The Development of the Law of International Organization by the Decisions of International Tribunals", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 152, 1976, p. 381, at p. 457; Linderfalk, *supra* note 539, p. 166; C.F. Amerasinghe, "Interpretation of Texts in Open International Organizations", *British Yearbook of International Law* vol. 65, No. 1 (1994), p. 175, at p. 199;. Villiger argues in favour of a certain frequency, but emphasizes that the important point is the establishment of an agreement, Villiger, *supra* note 616, p. 431, para. 22. Yasseen and Sinclair write that practice cannot "in general" be established by one single act, M.K. Yasseen, *supra* note 538, p. 47; I. Sinclair, *supra* note 538, p. 137; cf. Third Report for the ILC Study Group on Treaties over Time, in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press, 2013), p. 307, at p. 310.

[677] WTO, Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 297.

[678] WTO, Appellate Body Report, *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5. June 1998, para 92.

[679] WTO, Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 290.

(13) Whereas the Appellate Body did not use the term "specificity", it referred to the criteria mentioned above. Instead of clarity, the Appellate Body spoke of "consistency", and stated, that consistency should not set a benchmark but rather determine the degree of relevance. "Consistent prior classification practice may often be significant. Inconsistent classification practice, however, cannot be relevant (in interpreting the meaning of a tariff concession)".[680]

(14) A further factor that helps determine the relevance under article 32 may be the number of affected states that engage in that practice. The Appellate Body has stated:

> "To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance."[681]

### Conclusion 9
### Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

### Commentary

(1) The first sentence of paragraph 1 sets forth the principle that an "agreement" under article 31, paragraph 3 (a) and (b) requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept the interpretation contained therein. While the difference regarding the form of an "agreement" under subparagraph (a) and subparagraph (b) has already been set out in draft conclusion 4 and its accompanying commentary,[682] paragraph 1 of draft conclusion 9 intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

(2) The element which distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31, paragraph 3 (a) and (b), on the one hand, and other subsequent practice as a supplementary means of interpretation under article 32,[683] on the other, is the "agreement" of the parties regarding the interpretation of the treaty. It is this agreement of the parties which provides the means of interpretation under

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[680] WTO, Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 307; cf. also WTO, Appellate Body Report, *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5. June 1998, para. 95.

[681] WTO, Appellate Body Report, *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5. June 1998, para. 93.

[682] See commentary to draft conclusion 4, para. 10 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, chap. IV.C.2).

[683] See draft conclusion 2 and draft conclusion 4, para. 3 (*Ibid.*, A/68/10, chap. IV.C.1).

article 31, paragraph 3[684] their specific function and weight for the interactive process of interpretation under the general rule of interpretation of article 31.[685]

(3) Conflicting positions expressed by different parties to a treaty preclude the existence of an agreement. This has been confirmed, *inter alia*, by the Arbitral Tribunal in the case of *German External Debts* which held that a "tacit subsequent understanding" could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.[686]

(4) However, agreement is only absent to the extent that the positions of the parties conflict and for as long as their positions conflict. The fact that Parties apply a treaty differently does not, as such, permit a conclusion that there are conflicting positions regarding the interpretation of the treaty. Such a difference may indicate a disagreement over the one correct interpretation, but it may also simply reflect a common understanding that the treaty permits a certain scope for the exercise of discretion in its application.[687] Treaties which are characterized by considerations of humanity or other general community interests, such as treaties relating to human rights or refugees, tend to aim at a uniform interpretation but also to leave a margin of appreciation for the exercise of discretion by States.

(5) Whereas equivocal conduct by one or more parties will normally prevent the identification of an agreement,[688] not every element of the conduct of a State which does not fully fit into a general picture necessarily renders the conduct of that State so equivocal that it precludes the identification of an agreement. The Court of Arbitration in the *Beagle Channel* case, for example, found that although at one point the parties had a difference of opinion regarding the interpretation of a treaty, that fact did not necessarily establish that the lack of agreement was permanent:

> "... In the same way, negotiations for a settlement that did not result in one [viz. a settlement], could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of

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[684] See Crawford, *supra* note 570, p. 30: "There is no reason to think that the word 'agreement' in para. (b) has any different meaning as compared to the meaning it has in para. (a)".

[685] See commentary to draft conclusion 1, paras. 12–15 (*Official Records of the General Assembly, Sixty-eighth session, Supplement No. 10*, A/68/10, chap. IV.C.2); article 31 must be "read as a whole" and conceives of the process of interpretation as "a single combined operation", and is "not laying down a legal hierarchy of norms for the interpretation of treaties", *Yearbook ... 1966*, vol. II, p. 219, para. 8, and p. 220, para. 9.

[686] *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Award of 16 May 1980, *Reports of International Arbitral Awards*, vol. XIX, part III, p. 67, pp. 103–104, para. 31; see also WTO, Appellate Body Report, *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, para. 95; *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985, *Reports of International Arbitral Awards*, vol. XIX, part IV, p. 149, at p. 175, para. 66.

[687] See commentary to draft conclusion 7, paras. 12–15.

[688] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 231, at para. 258, para. 70; R. Kolb, *supra* note 643, p. 16.

their respective interpretations of the treaty, insofar as these acts were performed during the process of the negotiations. The matter cannot be put higher than that".[689]

(6) Similarly, in *Loizidou v. Turkey*, the European Court of Human Rights held that the scope of the restrictions which the parties could place on their acceptance of the competence of the Commission and the Court was "confirmed by the subsequent practice of the Contracting parties", that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that articles 25 and 46 ... of the Convention do not permit territorial or substantive restrictions".[690] The Court, applying article 31, paragraph 3 (b), described "such a State practice" as being "uniform and consistent", despite the fact that it simultaneously recognized that two States possibly constituted exceptions.[691] The decision suggests that interpreters, at least under the European Convention, possess some margin when assessing whether an agreement of the parties regarding a certain interpretation is established.[692]

(7) The term "agreement" in the Vienna Convention[693] does not imply any particular requirements of form,[694] including for an "agreement" under article 31, paragraph 3 (a) and (b).[695] The Commission, however, has noted that, in order to distinguish a subsequent agreement under article 31, paragraph 3 (a), and a subsequent practice which "establishes the agreement" of the parties under article 31, paragraph 3 (b), the former presupposes a "single common act".[696] There is no requirement that an agreement under article 31,

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[689] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 57, at p. 188, para. 171.

[690] *Loizidou*, *supra* note 670, paras. 79 and 81.

[691] *Ibid*., paras. 80 and 82; The case did not concern the interpretation of a particular human right, but rather the question of whether a State was bound to the Convention at all.

[692] The more restrictive jurisprudence of the WTO Dispute Settlement Body suggests that different interpreters may evaluate matters differently, see United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R, 31 October 2005, para. 7.218: "[…] even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a [certain] practice [...], this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. [...] We note that one third party in this proceeding submitted arguments contesting the view of the European Communities."

[693] See articles 2 (1) (a), 3, 24 (2), 39–41, 58 and 60.

[694] Commentary to draft conclusion 4, para. 5 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, chap. IV.C.2); confirmed by the Permanent Court of Arbitration in the Bay of Bengal Maritime Boundary Arbitration (*Bangladesh v. India*), Award of 7 July 2014, available at http://www.pca-cpa.org/showfile.asp?fil_id=2705, p. 47, para. 165; Yasseen, *supra* note 538, p. 45; Distefano, *supra* note 538, p. 47.

[695] Commentary to draft conclusion 4, para. 5 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, chap. IV.C.2); Gardiner, *supra* note 539, pp. 208–209 and 216–220; Aust, *supra* note 604, p. 213; Dörr, *supra* note 539, p. 554, para. 75; R. Gardiner, "The Vienna Convention Rules on Treaty Interpretation", in D.B. Hollis (ed.), The Oxford Guide to Treaties (Oxford, Oxford University Press, 2012), 475, 483.

[696] Commentary to draft conclusion 4, para. 10 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, chap. IV.C.2); a "single common act" may also consist of an exchange of letters, see *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, 29 June 1990, *ILR*, vol. 105, p. 1, at pp. 54–56; H. Fox, "Article 31 (3) (a) and (a) of the Vienna Convention and the *Kasikili/Sedudu Island Case*", in *Treaty Interpretation and the Vienna Convention on the Law of Treaties – 30 Years On*, M. Fitzmaurice, O. Elias and P. Merkouris, eds. (Martinus Nijhoff, 2010), p. 63; Gardiner, *supra* note 538, pp. 220–221.

paragraph 3 (a), be published or registered under Article 102 of the Charter of the United Nations.[697]

(8) For an agreement under article 31, paragraph 3, it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, but the parties must also be aware of and accept that these positions are common. Thus, in the *Kasikili/Sedudu Island* case, the International Court of Justice required that, for practice to fall under article 31, paragraph 3 (b), the "authorities were fully aware of and accepted this as a confirmation of the Treaty boundary".[698] Indeed, only the awareness and acceptance of the position of the other parties regarding the interpretation of a treaty justifies the characterization of an agreement under article 31, paragraph 3 (a) or (b), as an "authentic" means of interpretation.[699] In certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties which are implemented at the national level.

(9) The aim of the second sentence of paragraph 1 is to reaffirm that "agreement", for the purpose of article 31, paragraph 3, need not, as such, be legally binding,[700] In contrast to other provisions of the Vienna Convention in which the term "agreement is used in the sense of a legally binding instrument".[701]

(10) This is confirmed by the fact that the Commission, in its final draft articles on the law of treaties, used the expression "any subsequent practice which establishes the *understanding* [emphasis added] of the parties".[702] The expression "understanding" indicates that the term "agreement" in article 31, paragraph 3, does not require that the parties thereby undertake or create any legal obligation existing in addition to, or independently of, the treaty.[703] The Vienna Conference replaced the expression "understanding" by the word "agreement" not for any substantive reason but "related to drafting only" in order to emphasize that the understanding of the parties was to be their "common" understanding.[704] An "agreement" under article 31, paragraph 3 (a), being

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[697] A. Aust, "The theory and practice of informal international instruments", *International and Comparative Law Quarterly*, vol. 35, No. 4 (1986), pp. 789–790.

[698] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1094, para. 74 ("occupation of the island by the Masubia tribe") and pp. 1077, para. 55 ("Eason Report" which "appears never to have been made known to Germany"); Dörr, *supra* note 539, p. 560, para. 88.

[699] In this respect the ascertainment of subsequent practice under article 31 (3) (b) may be more demanding than what the formation of customary international law requires, but see Boisson de Chazournes, *supra* note 543, p. 53–55.

[700] Commentary to draft conclusion 4, para. 6 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, chap. IV.C.2); Ph. Gautier, Non-Binding Agreements, *Max Planck Encyclopedia of Public International Law*, available at mpepil.com, para. 14; M. Benatar, "From Probative Value to Authentic Interpretation: The Legal Effect of Interpretative Declarations", Revue belge de droit international, vol. 44 (2011), p. 170, at pp. 194–195; Aust, *supra* note 604, p. 213; Gardiner, *supra* note 538, p. 217; see also Third Report for the ILC Study Group on Treaties over Time, *supra* note 676, p. 307, at p. 375.

[701] See articles 2 (1) (a), 3, 24 (2), 39–41, 58 and 60.

[702] *Yearbook ... 1966*, vol. II, p. 222, para. 15.

[703] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 53, at p. 187, para. 169; *Young Loan Arbitration on German External Debts* (*Belgium, France, Switzerland, United Kingdom and United States v. Germany*), ILR vol. 59 (1980), pp. 541–542, para. 31; Karl, *supra* note 539, pp. 190–195; Kolb, *supra* note 643, pp. 25–26; Linderfalk, *supra* note 539, pp. 169–171.

[704] *Official Records of the United Nations Conference on the Law of Treaties*, p. 169, at para. 60 (see footnote 540 above); P. Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, N.

distinguished from an agreement under article 31, paragraph 3 (b), only in form and not in substance, equally need not be legally binding.[705]

(11) It is thus sufficient that the parties, by a subsequent agreement or a subsequent practice under article 31, paragraph 3, attribute a certain meaning to the treaty,[706] or in other words, adopt a certain "understanding" of the treaty.[707] Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), even if they are not in themselves legally binding, can thus nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31.[708] Accordingly, international courts and tribunals have not required that an "agreement" under article 31, paragraph 3, reflect the intention of the parties to create new, or separate, legally binding undertakings.[709] Similarly, memoranda of understanding have been recognized, on occasion, as "a potentially important aid to interpretation" – but "not a source of independent legal rights and duties".[710]

(12) Some members considered on the other hand that the term 'agreement' has the same meaning in all provisions of the Vienna Convention. According to those members, this term designates any understanding which has legal effect between the States concerned and the case-law referred to in the present commentary does not contradict this definition. Such a definition would not prevent taking into account, for the purpose of interpretation, a legally non-binding understanding under Article 32.

(13) The first sentence of paragraph 2 confirms the principle that not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b). The second sentence clarifies that acceptance of such practice by those parties not engaged in the practice can under certain circumstances be brought about by silence or inaction.

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Angelet, ed. (Bruylant, 2007), p. 425, at p. 431 ("La lettre a) du paragraphe 3 fait référence à un accord interprétatif et l'on peut que le terme << accord >> est ici utilisé dans un sens 'générique, qui ne correspond pas nécessairement au << traité >> défini à l'article 2 de la convention de Vienne. Ainsi, l'accord interprétatif ultérieur pourrait être un accord verbal, voire un accord politique.")

[705] Ph. Gautier, *supra* note 700, para. 14; Aust, *supra* note 604, pp. 211, 213.

[706] This terminology follows the commentary of guideline 1.2. (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties (see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10,* A/66/10/Add.1, p. 69, paras. 18 and 19).

[707] *Yearbook ... 1966*, vol. II, pp. 221–222, paras. 15 and 16 (uses the term "understanding" both in the context of what became article 31 (3) (a) as well as what became article 31 (3) (b)).

[708] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, *Reports of International Arbitral Awards*, vol. XXIV, p. 3, at p. 131, para. 6.7; Aust, "The theory and practice of informal international instruments", *supra* note 697, pp. 787 and 807; Linderfalk, *supra* note 539, p. 173; Hafner, *supra* note 615, pp. 110–113; Gautier, *supra* note 705, p. 434.

[709] E.g. "pattern implying the agreement of the parties regarding its interpretation", WTO, Appellate Body Report, Japan – Alcoholic Beverages II, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, section E, p. 13; or "pattern ... must imply agreement on the interpretation of the relevant provision", WTO, Panel Report, EC – IT Products, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010, para. 7.558; or "practice [which] reflects an agreement as to the interpretation", Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), The Islamic Republic of Iran *v.* the United States of America, Iran-USCTR, vol. 38 (2004–2009), p. 77, at p. 119, para. 116; or that "State practice" was "indicative of a lack of any apprehension on the part of the Contracting States"; Bankovic, *supra* note 561, para. 62.

[710] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, *Reports of International Arbitral Awards*, vol. XXIV, p. 2, at p. 131, para. 6.7; see also *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, *Reports of International Arbitral Awards*, vol. XXVII, part II, p. 35, at p. 98, para. 157.

(14) From the outset, the Commission has recognized that an "agreement" deriving from subsequent practice under article 31, paragraph 3 (b), can result, in part, from silence or inaction by one or more parties. Explaining why it used the expression "the understanding of the parties" in draft article 27, paragraph 3 (b) (which later became "the agreement" in article 31, paragraph 3 (b) (see paragraph 10 above)), and not the expression "the understanding of *all* the parties", the Commission stated that:

> "It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."[711]

(15) The International Court of Justice also has recognized the possibility of expressing agreement regarding interpretation by silence or inaction by stating, in the case concerning the *Temple of Preah Vihear*, that "where it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".[712] This general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions,[713] and supported generally by writers.[714] The "circumstances" which will "call for some reaction" include the particular setting in which the States parties interact with each other in respect of the treaty.[715]

(16) The Court of Arbitration in the *Beagle Channel* case[716] dealt with the contention by Argentina that acts of jurisdiction by Chile over certain islands could not be counted as relevant subsequent conduct, since Argentina had not reacted to these acts. The Court, however, held:

> "The terms of the Vienna Convention do not specify the ways in which agreement may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the treaty; nor

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[711] *Yearbook … 1966*, vol. II, p. 222, para. 15.

[712] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6, at p. 23.

[713] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, p. 815, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, ICTY-95-17/1, para. 179; *Rantsev*, *supra* note 662, para. 285; cautiously: WTO, Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 272; see also, for a limited holding, Iran-United States Claims Tribunal, Award No. 30-16-3, *RayGo Wagner Equipment Company v. Iran Express Terminal Corporation*, Iran-USCTR, vol. 2 (1983), p. 141, at p. 144; *Young Loan Arbitration on German External Debts (Belgium, France, Switzerland, United Kingdom and United States v. Germany)*, 16 May 1980, *Reports of International Arbitral Awards*, vol. XIX, part III, p. 67; ILR, vol. 59 (1980), p. 541, para. 31.

[714] M. Kamto, *supra* note 631, pp. 134–141; Yasseen, *supra* note 538, p. 49; Gardiner, *supra* note 538, p. 236; Villiger, *supra* note 616, p. 431, para. 22; Dörr, *supra* note 539, pp. 557 and 559, paras. 83 and 86.

[715] For example, when acting within the framework of an international organization, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, at pp. 675–676, paras. 99–101; Kamto, *supra* note 631, p. 136.

[716] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 53.

> could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves."[717]

In the same case, the Court of Arbitration considered that:

> "The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value could not — even if they nevertheless represented the official Argentine view — preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the 1881 Treaty – nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the treaty."[718]

(17) The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice held that:

> "Some of these activities — organization of public health and education, policing, administration of justice — could normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria."[719]

(18) This judgment suggests that in cases which concern treaties delimiting a boundary the circumstances will only very exceptionally call for a reaction with respect to conduct which runs counter to the delimitation. In such situations, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice.[720]

(19) The relevance of silence or inaction for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case. Decisions of international courts and tribunals demonstrate that acceptance of a practice by one or more parties by way of silence or inaction is not easily established.

(20) International courts and tribunals, for example, have been reluctant to accept that parliamentary proceedings or domestic court judgments are considered as subsequent practice under article 31, paragraph 3 (b), to which other parties to the treaty would be expected to react, even if such proceedings or judgments had come to their attention through other channels, including by their own diplomatic service.[721]

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[717] *Ibid.*, at p. 187, para. 169 (a).

[718] *Ibid.*

[719] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 352, para. 67.

[720] *Ibid.*, at p. 351, para. 64: "The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited ..., it follows that any Nigerian effectivités are indeed to be evaluated for their legal consequences as acts contra legem"; *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 586, para. 63; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, *Reports of International Arbitral Awards*, vol. XX, part II (Dissenting Opinion of Judge Bedjaoui), p. 119, at p. 181, para. 70.

[721] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 650, para. 48; WTO, Appellate Body Report, *EC – Chicken Cuts*,

(21) Further, even where a party, by its conduct, expresses a certain position towards another party (or parties) regarding the interpretation of a treaty, this does not necessarily call for a reaction by the other party or parties. In the *Kasikili/Sedudu Island* case, the International Court of Justice held that a State which did not react to the findings of a joint commission of experts, which had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter, did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute.[722] The Court found that the parties had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken on the political level. On a more general level, the WTO Appellate Body has held that:

> "in specific situations, the 'lack of reaction' or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it."[723]

The International Tribunal for the Law of the Sea has confirmed this approach. Taking into account the practice of states in interpreting articles 56, 58 and 73 of UNCLOS, the Tribunal stated:

> "The Tribunal acknowledges that the national legislation of several States, not only in the West African region, but also in some other regions of the world, regulates bunkering of foreign vessels fishing in their exclusive economic zones in a way comparable to that of Guinea-Bissau. The Tribunal further notes that there is no manifest objection to such legislation and that it is, in general, complied with."[724]

(22) The possible legal significance of silence or inaction in the face of a subsequent practice of a party to a treaty is not limited to contributing to a possible underlying common agreement, but may also play a role for the operation of non-consent based rules, such as estoppel, preclusion or prescription.[725]

(23) Once established, an agreement between the parties under article 31, paragraph 3 (a) and (b), can eventually be terminated. The parties may replace it by another agreement with a different scope or content under article 31, paragraph 3. In this case, the new agreement replaces the previous one as an authentic means of interpretation from the date of its existence, at least with effect for the future.[726] Such situations, however, should not be lightly assumed as States usually do not change their interpretation of a treaty according to short-term considerations.

(24) It is also possible for a disagreement to arise between the parties regarding the interpretation of the treaty after they had reached a subsequent agreement regarding such

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WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 334 ("... mere access to a published judgment cannot be equated with acceptance …").

[722] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1089–1091, paras. 65–68.

[723] WTO, Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 272 (footnote omitted).

[724] The M/V "Virginia G" Case (Panama/Guinea-Bissau), Judgment of 14 April 2014, para. 218.

[725] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, pp. 130–131 (Dissenting Opinion of Judge Spender).

[726] Hafner, *supra* note 615, p. 118; this means that the interpretative effect of an agreement under article 31 (3) does not necessarily go back to the date of the entry into force of the treaty, as Yasseen, *supra* note 538, p. 47, maintains.

interpretation. Such a disagreement, however, normally will not replace the prior subsequent agreement, since the principle of good faith prevents a party from simply disavowing the legitimate expectations which have been created by a common interpretation.[727] On the other hand, clear expressions of disavowal by one party of a previous understanding arising from common practice "do reduce in a major way the significance of the practice after that date", without however diminishing the significance of the previous common practice.[728]

**Conclusion 10**
**Decisions adopted within the framework of a Conference of States Parties**

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

**Commentary**

(1) Draft conclusion 10 addresses a particular form of action by States which may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties.[729]

(2) States typically use Conferences of States Parties as a form of action for the continuous process of multilateral treaty review and implementation.[730] Such Conferences can be roughly divided into two basic categories. First, some Conferences are actually an organ of an international organization within which States parties act in their capacity as members of that organ (e.g. meetings of the States parties of the World Trade Organization,

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[727] Karl, *supra* note 539, p. 151.

[728] *Maritime Dispute (Peru v. Chile), I.C.J., Judgment of 27 January 2014*, p. 52, para. 142. Available from www.icj-cij.org/docket/files/137/17930.pdf.

[729] Other designations include: Meetings of the Parties or Assemblies of the States Parties.

[730] See V. Röben, "Conference (Meeting) of States Parties", in *Max Planck Encyclopedia of Public International Law*, vol. II, R. Wolfrum, ed. (Oxford University Press, 2012), p. 605; R. R. Churchill and G. Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law", *American Journal of International Law*, vol. 94, No. 4 (2009), p. 623; J. Brunnée, "COPing with consent: law-making under multilateral environmental agreements", *Leiden Journal of International Law*, vol. 15, No. 1 (2002), p. 1; A. Wiersema, "The new international law-makers? Conference of the Parties to multilateral environmental agreements", *Michigan Journal of International Law*, vol. 31, 2009, p. 231; L. Boisson de Chazournes, "Environmental treaties in time", *Environmental Policy and Law*, vol. 39, No. 6 (2009), p. 293.

the Organization for the Prohibition of Chemical Weapons, or the International Civil Aviation Organization).[731] Such Conferences of States Parties do not fall within the scope of draft conclusion 10, which does not address the subsequent practice of and within international organizations.[732] Second, other Conferences of States Parties are convened pursuant to treaties that do not establish an international organization; rather, the treaty simply provides for more or less periodic meetings of the States parties for their review and implementation. Such review conferences are frameworks for States parties' cooperation and subsequent conduct with respect to the treaty. Either type of Conference of States Parties may also have specific powers concerning amendments and/or the adaptation of treaties. Examples include the review conference process of the 1972 Biological Weapons Convention (BWC),[733] the Review Conference under article VIII (3) of the 1968 Non-Proliferation Treaty (NPT),[734] and Conferences of States Parties established by international environmental treaties.[735] The International Whaling Commission (IWC) under the International Convention for the Regulation of Whaling[736] is a borderline case between the two basic categories of Conferences of States Parties and its subsequent practice was considered in the judgment of the International Court of Justice in the *Whaling in the Antarctic* case.[737]

(3) Since Conferences of States Parties are usually established by treaties they are, in a sense, 'treaty bodies'. However, they should not be confused with bodies which are

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[731] Agreement establishing the World Trade Organization (WTO Agreement) (United Nations, *Treaty Series*, vol. 1867, No. 31874), concluded at Marrakesh in 1994; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) (United Nations, *Treaty Series*, vol. 1974, No. 33757), opened for signature in 1993; Convention on International Civil Aviation (Chicago Convention) (United Nations, *Treaty Series*, vol. 15, No. 102), signed at Chicago in 1994.

[732] Subsequent agreements and subsequent practice under treaties which establish international organizations will be the subject of another report.

[733] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), 1972 (United Nations, *Treaty Series*, vol. 1015, No. 14860), article XI. According to this mechanism, States parties meeting in a review conference shall "review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention (...) are being realized. Such review shall take into account any new scientific and technological developments relevant to the Convention" (art. XII).

[734] Treaty on the Non-Proliferation of Nuclear Weapons 1968, (United Nations, *Treaty Series*, vol. 729, No. 10485); article VIII, paragraph 3, establishes that a review conference shall be held five years after its entry into force, and, if so decided, at intervals of five years thereafter "in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realized". By way of such decisions, States parties review the operation of the Treaty on the Non-Proliferation of Nuclear Weapons, article by article, and formulate conclusions and recommendations on follow-on actions.

[735] Examples include the Conference of the Parties of the United Nations Framework Convention on Climate Change, 1992 (United Nations, *Treaty Series*, vol. 1771, No. 30822), the CMP Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), 1997 (United Nations, *Treaty Series*, vol. 2303, No. 30822), and the Conference of the Contracting Parties of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), 1971 (United Nations, *Treaty Series*, vol. 996, No. 14583).

[736] The Convention is often described as establishing an international organization, but it does not do so clearly, and it provides IWC with features which fit the present definition of a Conference of States Parties.

[737] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf.

comprised of independent experts or bodies with a limited membership. Conferences of States Parties are more or less periodical meetings which are open to all of the parties of a treaty.

(4) In order to acknowledge the wide diversity of Conferences of States Parties and the rules under which they operate, paragraph 1 provides a broad definition of the term "Conference of States Parties" for the purpose of these draft conclusions, which only excludes action of States as members of an organ of an international organization (which will be the subject of a later draft conclusion).

(5) The first sentence of paragraph 2 recognizes that the legal significance of any acts undertaken by Conferences of States Parties depends, in the first instance, on the rules that govern the Conferences of States Parties, notably the constituent treaty and any applicable rules of procedure. Conferences of States Parties perform a variety of acts, including reviewing the implementation of the treaty, reviewing the treaty itself, and decisions under amendment procedures.[738]

(6) The powers of a Conference of States Parties can be contained in general clauses or in specific provisions, or both. For example, Article 7 (2) of the United Nations Framework Convention on Climate Change begins with the following general language, before enumerating thirteen specific tasks for the Conference, one of which concerns examining the obligations of the Parties under the treaty:

> "The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention."

(7) Specific provisions contained in various treaties refer to the Conference of the Parties proposing "guidelines" for the implementation of particular treaty provisions,[739] or defining "the relevant principles, modalities, rules and guidelines" for a treaty scheme.[740]

(8) Amendment procedures (in a broad sense of the term) include procedures by which the primary text of the treaty may be amended (the result of which mostly requires ratification by States parties according to their constitutional procedures), as well as tacit

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[738] Convention on Wetlands of International Importance especially as Waterfowl Habitat: article 6, paragraph 1, on review functions and article 10 *bis*, on amendments; United Nations Framework Convention on Climate Change: article 7, paragraph 2, on review powers, and article 15, on amendments; Kyoto Protocol, article 13, paragraph 4, on review powers of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, article 20 on amendment procedures; Convention on International Trade in Endangered Species of Wild Fauna and Flora (United Nations, *Treaty Series*, vol. 993, No. 14537), art. XI on review Conference of the Parties, and XVII on amendment procedures Treaty on the Non-Proliferation of Nuclear Weapons; World Health Organization Framework Convention on Tobacco Control (United Nations, *Treaty Series*, vol. 2302, No. 41032), article 23, paragraph 5 (review powers), article 28 (amendments) and article 33 (protocols).

[739] Articles 7 and 9, of the World Health Organization Framework Convention on Tobacco Control.

[740] Article 17 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change regarding emissions-trading provides an example, see Churchill and Ulfstein, *supra* note 730, p. 639; J. Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", in R. Wolfrum and v. Röben (eds.), *Developments of International Law in Treaty Making*, (Berlin, Springer, 2005), pp. 110–115.

acceptance and opt-out procedures[741] that commonly apply to annexes, containing lists of substances, species or other elements that need to be updated regularly.[742]

(9) As a point of departure, paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and any applicable rules of procedure. The word "primarily" leaves room for subsidiary rules "unless the treaty otherwise provides" (see e.g. articles 16, 20, 22, paragraph 1, 24, 70, paragraph 1, and 72, paragraph 1, of the Vienna Convention on the Law of Treaties). The word "any" clarifies that rules of procedure of Conferences of States Parties, if they exist, will apply, given that there may be situations where such conferences operate with no specifically adopted rules of procedure.[743]

(10) The second sentence of paragraph 2 recognizes that decisions of Conferences of States Parties may constitute subsequent agreement or subsequent practice for treaty interpretation under articles 31 and 32 of the Vienna Convention. Decisions adopted within the framework of Conferences of States Parties can perform an important function for determining the Parties' common understanding of the meaning of the treaty.

(11) Decisions of Conferences of States Parties, *inter alia*, may constitute or reflect subsequent agreements under article 31, paragraph 3 (a), by which the parties interpret the underlying treaty. For example, the Biological Weapons Convention Review Conference has regularly adopted "understandings and additional agreements" regarding the interpretation of the Convention's provisions. These agreements have been adopted by States Parties within the framework of the review conferences, by consensus, and they "have evolved across all articles of the treaty to address specific issues as and when they arose".[744] Through these understandings, States Parties interpret the provisions of the Convention by defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation. The Biological Weapons Convention Implementation and Support Unit[745] defines an "additional agreement" as one which:

> (i) Interprets, defines or elaborates the meaning or scope of a provision of the Convention; or
>
> (ii) Provides instructions, guidelines or recommendations on how a provision should be implemented.[746]

(12) Similarly, the Conference of States Parties under the London (Dumping) Convention has adopted resolutions interpreting that convention. The Sub-Division for Legal Affairs of

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[741] See J. Brunnée, "Treaty amendments", in D.B. Hollis, (ed.), *The Oxford Guide to Treaties*, (Oxford, Oxford University Press, 2012), pp. 354–360.

[742] *Ibid.*

[743] This is the case, for example, for the UN Framework Convention on Climate Change.

[744] See P. Millett, "The Biological Weapons Convention: securing biology in the twenty-first century", *Journal of Conflict and Security Law*, vol. 15, No. 1 (2010), p. 33.

[745] The "Implementation Support Unit" was created by the Conference of States Parties, in order to provide administrative support to the Conference, and to enhance confidence building measures among States parties (see Final Document of the Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.VI/6), pp. 19–20).

[746] See background information document submitted by the Implementation and Support Unit, prepared for the Seventh Review Conference of the States Parties to the Convention, entitled "Additional agreements reached by previous Review Conferences relating to each article of the Convention" (BWC/CONF.VII/INF.5) (updated to include the understandings and agreements reached by that Conference, Geneva 2012).

the International Maritime Organization, upon a request of the governing bodies, opined as follows in relation to an "interpretative resolution" of the Conference of States Parties under the London Convention:

> According to article 31, paragraph (3) (a), of the Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention), subsequent agreements between the Parties shall be taken into account in the interpretation of a treaty. The article does not provide for a specific form of the subsequent agreement containing such interpretation. This seems to indicate that, provided its intention is clear, the interpretation could take various forms, including a resolution adopted at a meeting of the parties, or even a decision recorded in the summary records of a meeting of the parties.[747]

(13) In as similar vein, the World Health Organization (WHO) Legal Counsel has stated in general terms that:

> "Decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a 'subsequent agreement between the Parties regarding the interpretation of the treaty', as stated in Article 31 of the Vienna Convention".[748]

(14) Commentators have also viewed decisions of Conferences of States Parties as being capable of embodying subsequent agreements[749] and have observed that:

> "Such declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty."[750]

(15) The International Court of Justice has held with respect to the role of the IWC under the International Convention for the Regulation of Whaling:

> "Article VI of the Convention states that '[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention'. These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule."[751]

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[747] Agenda item 4 (Ocean fertilization), submitted by the Secretariat on procedural requirements in relation to a decision on an interpretive resolution: views of the IMO Sub-Division of Legal Affairs (International Maritime Organization, document LC 33/J/6, para. 3).

[748] See Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, "Revised Chairperson's text on a protocol on illicit trade in tobacco products, and general debate: legal advice on the scope of the protocol", note by the WHO Legal Counsel on scope of the protocol on illicit trade in tobacco products (World Health Organization, document FCTC/COP/INB-IT/3/INF.DOC./6, annex); S.F. Halabi, "The World Health Organization's Framework Convention on Tobacco Control: an analysis of guidelines adopted by the Conference of the Parties", *Georgia Journal of International and Comparative Law*, vol. 39, 2010, pp. 14–16.

[749] [illegible] H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford, Oxford University Press, 2011), p. 83 (with respect to the Non-Proliferation Treaty); Aust, *supra* note 604, pp. 213–214.

[750] B.M. Carnahan, "Treaty review conferences", *American Journal of International Law*, vol. 81, No. 1 (1987), p. 229.

[751] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 46.

(16) The following examples from the practice of Conferences of States Parties support the proposition that decisions by such Conferences may embody subsequent agreements under article 31, paragraph 3 (a):

(17) "Article I, paragraph 1, of the Biological Weapons Convention provides that States parties undertake never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

> Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes";

(18) At the third Review Conference (1991), States parties specified that:[752]

> "the prohibitions established in this provision relate to microbial or other biological agents, or toxins, which are "harmful to plants and animals, as well as humans (…)";

(19) Article 4, paragraph 9, of the Montreal Protocol has given rise to a debate about the definition of its term "State not party to this Protocol". According to Article 4, paragraph 9

> "For the purposes of this Article, the term 'State not party to this Protocol' shall include, with respect to a particular controlled substance, a State or regional economic integration organization that has not agreed to be bound by the control measures in effect for that substance."

(20) In the case of hydrochlorofluorocarbons (or HCFCs), two relevant amendments, the Beijing amendment and the Copenhagen amendment, impose obligations which raised the question as to whether a State, in order to be "not party to this Protocol", has to be a non-party with respect to both amendments. The COP decided that

> "The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments."[753]

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[752] Final Declaration of the Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.III/23, part II).

[753] For details, see decision XV/3 on obligations of parties to the Beijing Amendment under article 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons, Montreal Protocol on Substances that Deplete the Ozone Layer (United Nations, *Treaty Series*, vol. 1522, No. 26369); the definition itself is formulated as follows: 1. (...) (a) The term "State not party to this Protocol" in article 4, paragraph 9 does not apply to those States operating under article 5, paragraph 1, of the Protocol until January 1, 2016 when, in accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under article 5, paragraph 1, of the Protocol; (b) The term "State not party to this Protocol" includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments; (c) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term "State not party to this Protocol," paragraph 1 (b) shall apply unless such a State has by 31 March 2004: (i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible; (ii) Certified that it is in full compliance with articles 2, 2A to 2G and article 4 of the Protocol, as amended by the Copenhagen Amendment; (iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005, in which case that State shall fall outside the definition of "State not party to this Protocol" until the conclusion of the Seventeenth Meeting of the Parties (UNEP/OzL.Pro.15/9, chap. XVIII.A).

(21) Whereas the acts which are the result of a tacit acceptance procedure[754] are not, as such, subsequent agreements by the parties under article 31, paragraph 3 (a), they can, in addition to their primary effect under the treaty, under certain circumstances imply such a subsequent agreement. One example concerns certain decisions of the Conference of the Parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention).[755] At its sixteenth meeting, held in 1993, the Consultative Meeting of Contracting Parties adopted three amendments to annex I by way of the tacit acceptance procedure provided for in the Convention.[756] As such, these amendments were not subsequent agreements. They did, however, also imply a wide-ranging interpretation of the underlying treaty itself.[757] The amendment refers to and builds on a resolution that was adopted by the Consultative Meeting held three years earlier and which had established the agreement of the parties that "[t]he London Dumping Convention is the appropriate body to address the issue of low-level radioactive waste disposal into sub-seabed repositories accessed from the sea".[758] The resolution has been described as "effectively expand[ing] the definition of 'dumping' under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunnelling".[759] Thus, the amendment confirmed that the interpretative resolution contained a subsequent agreement regarding the interpretation of the treaty.

(22) The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal provides in Article 17, paragraph 5, that "Amendments (…) shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted them (…)". Led by an Indonesian-Swiss initiative, the Conference of the Parties decided to clarify the requirement of the acceptance by three-fourths of the Parties, by agreeing,

> "without prejudice to any other multilateral environmental agreement, that the meaning of paragraph 5 of Article 17 of the Basel Convention should be interpreted to mean that the acceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment is required for the entry into force of such amendment, noting that such an interpretation of paragraph 5 of Article 17 does not compel any party to ratify the Ban Amendment."[760]

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[754] See paragraph (8) above.

[755] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention), (United Nations, *Treaty Series*, vol. 1046, No. 15749).

[756] See London sixteenth Consultative Meeting of the Contracting Parties, resolution LC.51 (16), and resolution LC.50 (16); First, the decided to amend the phase-out-dumping of industrial waste by 31 December 1995. Second, it banned the incineration at sea of industrial waste and sewage sludge. And finally, it decided to replace para. 6 of annex I, banning the dumping of radioactive waste or other radioactive matter (see "Dumping at sea: the evolution of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), 1972", *Focus on IMO* (London, International Maritime Organization, July 1997).

[757] It has even been asserted that these amendments to annex I of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter "constitute major changes in the Convention" (see Churchill and Ulfstein, *supra* note 730, p. 638).

[758] International Maritime Organization, resolution LDC.41 (13), para. 1.

[759] Churchill and Ulfstein, *supra* note 730, p. 641.

[760] BC-10/3: Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention, in Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its tenth meeting (Cartagena, Colombia, 17–21 October 2011), UNEP/CHW.10/28, at p. 31.

The parties adopted this decision on the interpretation of article 17, paragraph 5, by consensus, with many States Parties underlining that the Conferences of the States Parties to any convention are "the ultimate authority as to its interpretation".[761] While this suggests that the decision embodies a subsequent agreement of the parties under article 31, paragraph 3 (a), the decision was taken after a debate about whether a formal amendment of the Convention was necessary to achieve this result.[762] It should also be noted that Japan, requesting that this position be reflected in the Conference's Report, stated that his delegation "supported the current-time approach to the interpretation of the provision of the Convention regarding entry into force of amendments, as described in a legal advice provided by the United Nations Office of Legal Affairs as the Depositary,[763] and had accepted the fixed-time approach enunciated in the decision on the Indonesian-Swiss country-led initiative *only in this particular instance*."[764]

(23) The preceding examples demonstrate that decisions of Conferences of States Parties may embody under certain circumstances subsequent agreements under article 31, paragraph 3 (a), and give rise to subsequent practice under articles 31, paragraph 3 (b), or to other subsequent practice under article 32 if they do not reflect agreement of the parties. The respective character of a decision of a Conference of States Parties, however, must always be carefully identified. For this purpose, the specificity and the clarity of the terms chosen in the light of the text of the Conference of the States Parties decision as a whole, its object and purpose, and the way in which it is applied, need to be taken into account. The parties often do not intend that such a decision has any particular legal significance.

(24) The last sentence of paragraph 2 of draft conclusion 10 reminds the interpreter that decisions of Conferences of States Parties often provide a range of practical options for implementing the treaty, which may not necessarily embody a subsequent agreement and subsequent practice for the purpose of treaty interpretation. Indeed, Conferences of States Parties often do not explicitly seek to resolve or address questions of interpretation of a treaty.

(25) A decision by the Conference of the States Parties to the WHO Framework Convention on Tobacco Control provides an example.[765] Articles 9 and 10 of the Convention deal, respectively, with the regulation of the contents of tobacco products, and with the regulation of the disclosure of information regarding the contents of such products. Acknowledging that such measures require the allocation of significant financial resources, the States Parties agreed, under the title of "practical considerations" for the implementation of articles 9 and 10, on "some options that Parties could consider using", such as

> "(a) designated tobacco taxes;

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[761] *Ibid.*, para. 65.

[762] See Günther Handl, "International "Lawmaking" by Conferences of the Parties and other Politically Mandated Bodies", in *Developments of International Law in Treaty Making*, Rüdiger Wolfrum and Volker Röben, eds. (Springer 2005) p. 127, at p. 132.

[763] The "current-time approach" favoured by the UN Legal Adviser stipulates that "[w]here the treaty is silent or ambiguous on the matter, the practice of the Secretary-General is to calculate the number of acceptances on the basis of the number of parties to the treaty at the time of deposit of each instrument of acceptance of an amendment." See extracts from OLA's Memorandum of 8 March 2004, available at http://www.basel.int/TheConvention/Overview/Amendments/Background/tabid/2760/Default.aspx.

[764] Report of the Conference of the Parties to the Basel Convention, *supra* note 760, para. 68. Emphasis added.

[765] 2003 WHO Framework Convention on Tobacco Control, 2302 U.N.T.S. 166.

(b) tobacco manufacturing and/or importing licensing fees;

(c) tobacco product registration fees;

(d) licensing of tobacco distributors and/or retailers;

(e) non-compliance fees levied on the tobacco industry and retailers; and

(f) annual tobacco surveillance fees (tobacco industry and retailers)."[766]

This decision provides a non-exhaustive range of practical options for implementing articles 9 and 10 of the Convention. The parties have thereby, however, implicitly agreed that the stated "options" would, as such, be compatible with the Convention.

(26) It follows that decisions of Conferences of States Parties may have different legal effects. Such decisions are often not intended to embody a subsequent agreement under article 31, paragraph 3 (a), by themselves because they are not meant to be a statement regarding the interpretation of the treaty. In other cases the parties have made it sufficiently clear that the Conference of State Parties decision embodies their agreement regarding the interpretation of the treaty. In still other cases they may produce a legal effect in combination with a general duty to cooperate under the treaty, which then puts the parties "under an obligation to give due regard" to such a decision.[767] In any case, it cannot simply be said that because the treaty does not accord the Conference of the States Parties a competence to take legally binding decisions, their decisions are necessarily legally irrelevant and constitute only political commitments.[768]

(27) Ultimately, the effect of a decision of a Conference of States Parties depends on the circumstances of each particular case and such decisions need to be properly interpreted. A relevant consideration may be whether States parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties decision. Discordant practice following a Conference of States Parties decision may be an indication that States did not assume that the decision would be a subsequent agreement under article 31, paragraph 3 (a).[769] Conference of States Parties' decisions which do not qualify as subsequent agreements under article 31, paragraph 3 (a), or as subsequent practice under article 31, paragraph 3 (b), nevertheless may be a subsidiary means of interpretation under article 32.[770]

(28) Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. Thus, what is important is the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision is reached. Acts which originate from Conferences of States Parties may have different forms and designations, and they may be the result of different procedures. Conferences of States Parties may even

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[766] FCTC/COP4(10): Partial guidelines for implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control (Regulation of the contents of tobacco products and Regulation of tobacco product disclosures), Annex, adopted at the 4th Conference of the States Parties to the WHO Framework Convention on Tobacco Control (Punta del Este, Uruguay, 15–20 November 2010).

[767] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 83.

[768] *Ibid.*, para. 46.

[769] See commentary on draft conclusion 9, paragraphs (22)–(23) above.

[770] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf (Separate opinion of Judge *ad hoc* Charlesworth, para. 4: "I note that resolutions adopted by a vote of the IWC have some consequence although they do not come within the terms of Article 31.3 of the Vienna Convention").

operate without formally adopted rules of procedure.[771] If the decision of the Conference of States Parties is based on a unanimous vote in which all parties participate, it may clearly embody a "subsequent agreement" under article 31, paragraph 3 (a), provided that it is "regarding the interpretation of the treaty".

(29) Conference of States Parties decisions regarding review and implementation functions, however, normally are adopted by consensus. This practice derives from rules of procedure which usually require States parties to make every effort to achieve consensus on substantive matters. An early example can be found in the Provisional Rules of Procedure for the Review Conference of the Parties to the Biological Weapons Convention. According to rule 28, paragraph 2:

> "The task of the Review Conference being to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted."[772]

This formula, with only minor variations, has become the standard with regard to substantive decision-making procedures at Conferences of States Parties.

(30) In order to address concerns relating to decisions adopted by consensus, the phrase "including by consensus" was introduced at the end of paragraph 3 in order to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance. Indeed, consensus is not a concept which necessarily indicates any particular degree of agreement on substance. According to the *Comments on some Procedural Questions* issued by the Office of Legal Affairs of the United Nations Secretariat in accordance with United Nations General Assembly resolution 60/286 (2006):[773]

> "Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect 'unanimity' of opinion on the substantive matter. It is used to

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[771] The Conference of States Parties to the UNFCCC provisionally applies the draft rules of procedure, contained in FCCC/CP/1996/2, with the exception of draft rule 42 "Voting", since no agreement has been reached so far on one of the two voting alternatives contained therein, cf. Report of the Conference of the Parties on its first session (28 March to 7 April 1995) (FCCC/CP/1995/7), p. 8, para. 10; Report of the Conference of the Parties on its nineteenth session (11 to 23 November 2013) (FCCC/CP/2013/10), p. 6, para. 4; similarly, the Conference of States Parties to the Convention on Biological Diversity did not adopt Rule 40 paragraph 1 (Voting) of the Rules of Procedure "because of the lack of consensus among the Parties concerning the majority required for decision-making on matters of substance", Report of the Eleventh Meeting of the Conference of the Parties to the Convention on Biological Diversity (8–19 October 2012) (UNEP/CBD/COP/11/35), at p. 21, para. 65.

[772] See rule 28, paragraph 2, of the provisional rules of procedure for the Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, held in Geneva, from 3 to 21 March 1980 (BWC/CONF.I/2).

[773] See General Assembly resolution 60/286 of 8 September 2006, on revitalization of the General Assembly, requiring the United Nations Secretariat "to make precedents and past practice available in the public domain with respect to rules and practices of the intergovernmental bodies of the Organization" (para. 24).

describe the practice under which every effort is made to achieve general agreement and no delegation objects explicitly to a consensus being recorded."[774]

(31) It follows that adoption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3 (b). The rules of procedure of Conferences of States Parties usually do not give an indication as to the possible legal effect of a resolution as a subsequent agreement under article 31, paragraph 3 (a) or a subsequent practice under article 31, paragraph 3 (b). Such rules of procedure only determine how the Conference of States Parties shall adopt its decisions, not their possible legal effect as a subsequent agreement under article 31, paragraph 3. Although subsequent agreements under article 31, paragraph 3 (a) need not be binding as such, the Vienna Convention attributes them a legal effect under article 31 only if there exists agreement in substance among the parties concerning the interpretation of a treaty. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.[775]

(32) That certain decisions, despite having been declared as being adopted by consensus, cannot represent a subsequent agreement under article 31, paragraph 3 (a), is especially true when there exists an objection by one or more States Parties to that consensus.

(33) For example, at its Sixth Meeting in 2002, the Conference of the States Parties to the Convention on Biological Diversity worked on formulating guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats or species.[776] After several efforts to reach an agreement had failed, the President of the Conference of the States Parties proposed that the decision be adopted, and the reservations which Australia had raised be recorded in the final report of the meeting. Australia's representative, however, reiterated that the guiding principles could not be accepted and that "his formal objection therefore stood".[777] The President declared the debate closed and, "following established practice", declared the decision adopted without a vote, clarifying that the objections of the dissenting States would be reflected in the final report of the meeting. Following the adoption, Australia reiterated its view that consensus is adoption without formal objection, and expressed concerns about the legality of the adoption of the draft decision. As a result, a footnote to decision VI/23 indicates that "one representative entered a formal objection during the process leading to the adoption of this decision and underlined that he did not believe that the Conference of the Parties could legitimately adopt a motion or a text with a formal objection in place".[778]

(34) In this situation, the Executive Secretary of the Convention on Biological Diversity requested a legal opinion from the United Nations Legal Counsel.[779] The opinion by the UN Legal Counsel[780] expressed the view that a party could "disassociate from the substance or text of the document, indicate that joining consensus does not constitute acceptance of the

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[774] See "Consensus in UN practice: general", paper prepared by the Secretariat. Available from http://legal.un.org/ola/media/GA_RoP/GA_RoP_EN.pdf; see also R. Wolfrum and J. Pichon, "Consensus", in Max Planck Encyclopedia of Public International Law (www.mpepil.com), paras. 3–4, 24.

[775] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 83.

[776] See decision VI/23 (UNEP/CBD/COP/6/20, annex I).

[777] Report of the sixth meeting of the Conference of the Parties to the Convention on Biological Diversity, (UNEP/CBD/COP/6/20), para. 313.

[778] *Ibid.*, para. 318; for the discussion see paras. 294–324.

[779] Available from the secretariat of the Convention on Biological Diversity, document SCBD/SEL/DBO/30219 (6 June 2002).

[780] *Ibid.*

substance or text or parts of the document and/or present any other restrictions on its Government's position on the substance or text of the document (…)".[781] Thus, it is clear that a decision by consensus can occur in the face of rejection of the substance of the decision by one or more of the States Parties.

(35) The decision under the Convention on Biological Diversity, as well as a similar decision reached in Cancún in 2010 by the Meeting of the Parties to the Kyoto Protocol to the Climate Change Convention (Bolivia's objection notwithstanding),[782] raise the important question of what "consensus" means.[783] However, this question, which does not fall within the scope of the present topic, must be distinguished from the question of whether all the parties to a treaty have arrived at an agreement in substance on matters of interpretation of that treaty under article 31, paragraphs 3 (a) and (b). Decisions by Conferences of States Parties, which do not reflect agreement in substance among all the parties, do not qualify as agreements under article 31, paragraph 3, but maybe a form of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3).

(36) A different issue concerns the legal effect of a decision of a Conference of the Parties once it qualifies as an agreement under article 31, paragraph (3). In 2011, the IMO Sub-Division for Legal Affairs was asked to "advise the governing bodies […] about the procedural requirements in relation to a decision on an interpretative resolution and, in particular, whether or not consensus would be needed for such a decision".[784] In its response, while confirming that a resolution by the Conference of States Parties can constitute, in principle, a subsequent agreement under article 31, paragraph 3 (a), the IMO Sub-Division for Legal Affairs advised the governing bodies that even if the Conference were to adopt a decision based on consensus, that would not mean that the decision would be binding on all the parties.[785]

(37) Although the opinion of the IMO Sub-Division for Legal Affairs proceeded from the erroneous assumption that a "subsequent agreement" under article 31, paragraph 3 (a), would only be binding "as a treaty, or an amendment thereto",[786] it came to the correct conclusion that even if the consensus decision by a Conference of the Parties embodies an agreement regarding interpretation in substance it is not (necessarily) binding upon the parties.[787] Rather, as the Commission has indicated, a subsequent agreement under article 31, paragraph 3 (a), is only one of different means of interpretation to be taken into account in the process of interpretation.[788]

(38) Thus, interpretative resolutions by Conferences of States Parties which are adopted by consensus, even if they are not binding as such, can nevertheless be subsequent agreements under article 31, paragraph 3 (a), or subsequent practice under article 31, paragraph 3 (b), if there are sufficient indications that that was the intention of the parties at

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[781] *Ibid.*, document UNEP/SCBD/30219R (17 June 2002).

[782] See decision 1/CMP.6 on the Cancun Agreements: outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session; and decision 2/CMP.6 the Cancun Agreements: land use, land-use change and forestry, adopted by Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (FCCC/KP/CMP/2010/12/Add.1); and proceedings of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (FCCC/KP/CMP/2010/12), para. 29.

[783] See "Third report for the ILC Study Group on Treaties over Time", *supra* note 676, pp. 372–377.

[784] International Maritime Organization, document LC 33/4, para. 4.15.2.

[785] International Maritime Organization, document LC 33/J/6, para. 3.

[786] *Ibid.*, para. 8.

[787] See commentary on draft conclusion 9, paragraphs (9)–(11) above.

[788] Commentary to draft conclusion 2, para. 4 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), chap. IV.C.2).

the time of the adoption of the decision, or if the subsequent practice of the parties establishes an agreement on the interpretation of the treaty.[789] The interpreter must give appropriate weight to such an interpretative resolution under article 31, paragraph 3 (a), but not necessarily treat it as legally binding.[790]

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[789] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, (Separate opinion of Judge Greenwood, para. 6, and Separate opinion of Judge *ad hoc* Charlesworth, para. 4).

[790] Commentary to draft conclusion 2, para. 4 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), chap. IV.C.2).

# Chapter VIII
# Protection of the atmosphere

## A. Introduction

77. The Commission, at its sixty-third session (2011), decided to include the topic "Protection of the atmosphere" in its long-term programme of work,[791] on the basis of the proposal, which was reproduced in annex B to the report of the Commission on the work of that session.[792] The General Assembly, in paragraph 7 of its resolution 66/98 of 9 December 2011, took note of the inclusion of the topic in the Commission's long-term programme of work.

78. At its 3197th meeting, on 9 August 2013, the Commission decided to include the topic "Protection of the atmosphere" in its programme of work, together with an understanding,[793] and to appoint Mr. Shinya Murase as Special Rapporteur for the topic.

## B. Consideration of the topic at the present session

79. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/667). The Commission considered the report at its 3209th to 3214th meetings, on 22, 23, 27, 28 and 30 May and on 3 June 2014.

### 1. Introduction by the Special Rapporteur of the first report

80. The first report sought to address the general objective of the project, including providing the rationale for work on the topic, delineating its general scope, identifying the relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject. In this connection, the report provided an overview of the evolution of international law on the protection of the atmosphere, discussed the relevant sources of law, including customary international law, treaty practice, and jurisprudence, and analyzed definitional aspects of the topic, elements pertinent to delineating the scope and the question of the legal status of the atmosphere, while offering draft guidelines therefor.

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[791] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 365–367.

[792] *Ibid.*, pp. 315–329.

[793] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 168. The Commission included the topic in its programme on the understanding that: "(a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights; (b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to 'fill' gaps in the treaty regimes; (c) Questions relating to outer space, including its delimitation, are not part of the topic; (d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur's reports would be based on such understanding."

81. In introducing the report, the Special Rapporteur, recalling the background to the inclusion of the topic in the agenda of the Commission, as well as the debates in the Sixth Committee of the General Assembly, underlined that he took seriously the criticisms made regarding the feasibility of the topic, given its highly technical nature, as well as the treaty-based rules of the law in this field. He, together with the Commission, would seek to consult the experts in the field for scientific and technical advice, as an understanding of the scientific and technical aspects of the atmospheric degradation was essential to effectively addressing the protection of the atmosphere. Moreover, he stressed that the report was prepared in full compliance with the 2013 understanding and assured the Commission, in particular, that he had neither the intention to interfere with relevant political negotiations nor to deal with specific polluting substances. At the same time, he noted that, as the understanding was "without prejudice", the Commission was not precluded from referring to certain questions mentioned in paragraph (a) of the understanding in the study of the topic. The main task for the Commission consisted in identifying custom, whether established or emerging, regarding the topic and identifying, rather than filling, any gaps in the existing treaty regimes, while also seeking to explore possible mechanisms of international cooperation.

82. Recalling that the deteriorating state of the atmosphere had made its protection a pressing concern for the international community, the Special Rapporteur noted that the topic presented an opportunity for the Commission to address issues pertaining to special regimes from the perspective of general international law, a functional responsibility that the Commission was well placed to discharge. In his view, there was abundant evidence of State practice, including treaties, judicial precedents, and other normative documents, which would enable the Commission to address the topic essentially as a legal question rather than a political one. The Special Rapporteur also offered a historical sketch of the development of international law relating to the atmosphere, beginning in the 6th Century, to the 18th Century, when its modern history begins, leading to the *locus classicus* in relation to transboundary air pollution in the *Trail Smelter* award of 1941 and culminating in the concretization of international environmental law as a specialized field of study in subsequent years, including in the 1970s with the adoption of the Stockholm Declaration. He advocated a detailed and critical study of the topic based on the various sources of international law on the subject.

83. The Special Rapporteur highlighted that the contemporary challenges to the atmosphere concerned three areas, namely (a) tropospheric transboundary air pollution, (b) stratospheric ozone depletion and (c) climate change, while also noting, in that regard, that there was no treaty regime that covered all areas of atmospheric problems, nor treated the atmosphere as a global single unit, even though treaty-making activities had been undertaken with respect to each area.

84. The Special Rapporteur offered: relevant information on the physical characteristics of the atmosphere, serving as the basis for the definition of "atmosphere" for the purposes of the draft guidelines; broad outlines of the various elements comprising the scope of the project, with a view to identifying the main legal questions to be covered; and an analysis of the question of the legal status of the atmosphere, which he considered to be a prerequisite for the Commission's consideration of the topic. In particular, he favoured the application of the concept "common concern of humankind" to characterize the legal status of the atmosphere rather than either *res communis* or common heritage of mankind. In this context, he also introduced three draft guidelines, which were of a general nature, proposed in his first report, concerning the (a) definition of the term "atmosphere", addressing both its substantive aspect, as a layer of gases, and its functional aspect, as a medium within

which the transport and dispersion of airborne substances occurs;[794] (b) the scope of the draft guidelines,[795] which would encompass addressing atmospheric degradation caused by anthropogenic activities that involve the introduction of deleterious substances or energy into the atmosphere and the alteration of its composition, seeking to protect both the natural and human environment, and drawing interlinkages between the atmosphere with other areas such as the sea, biodiversity (forestry, desertification and wetland), and other aspects of human activity and the law governing such activities; and (c) the legal status of the atmosphere,[796] projecting the atmosphere as a natural resource, distinguishing it from "airspace", whose legal status was unprejudiced, and offering the proposition that the protection of atmosphere was a common concern of humankind.

## 2. Summary of the debate

### (a) General comments

85. Members acknowledged that the protection of the atmosphere was extremely important for humankind, while echoing the concerns, supported by scientific data, posed to the atmosphere, in particular, by air pollution, ozone depletion and climate change. It was asserted that the topic, which was legally, politically and technically and scientifically complex, and which concerned a real and pressing issue, with visible adverse impacts on people's daily lives as, for instance, natural disasters wrought havoc in many parts of the globe and pollution caused premature deaths of many and significant health problems. At the same time, members were more than aware of the intractable difficulties pertaining to the topic and appearing in discussions among States and recognized that the challenge for the Commission was what role it could play to make a proper contribution to the overall global endeavours, to protect the environment.

86. For some members, it was essential, more so, given the background to the inclusion of the topic on the Commission's agenda and the diversity of the comments made in the Sixth Committee in 2012 and 2013, that the Commission take a more deliberate and

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[794] The text of draft guideline 1, as proposed by the Special Rapporteur, read as follows:

**"Use of terms**

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the layer of gases surrounding the earth in the troposphere and the stratosphere, within which the transport and dispersion of airborne substances occurs."

(b)

[795] The text of draft guideline 2, as proposed by the Special Rapporteur, read as follows:

**"Scope of the guidelines**

(a) The present draft guidelines address human activities that directly or indirectly introduce deleterious substances or energy into the atmosphere or alter the composition of the atmosphere, and that have or are likely to have significant adverse effects on human life and health and the earth's natural environment.

(b) The present draft guidelines refer to the basic principles relating to the protection of the atmosphere as well as to their inter-relationship."

[796] The text of draft guideline 3, as proposed by the Special Rapporteur, read as follows:

**"Legal Status of the Atmosphere**

(a) The atmosphere is a natural resource essential for sustaining life on earth, human health and welfare, and aquatic and terrestrial ecosystems; hence, its protection is a common concern of humankind.

(b) Nothing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law."

cautious approach. In this connection, there was a detailed discussion of the 2013 understanding and its implications for the Commission's work. In the view of some members, the understanding needed to be taken seriously, regardless of whether or not one liked its content. It was a condition *sine qua non* for commencing work on the topic. Furthermore, some members expressed concern that the Special Rapporteur, in preparing and introducing his report, had not been fully compliant with the terms of the understanding; with others finding it disquieting that he seemed to downplay its importance, by seeking to evade its clear terms, or to steer the project in a direction that would not be faithful to the letter or spirit of the understanding. It was noted in particular, that the implication that new rules would be developed or gaps in the law would be filled contradicted the understanding. Moreover, the concern was expressed that the proposal by the Special Rapporteur to focus on air pollution, ozone depletion and climate change would conceivably interfere with political negotiations on those subjects.

87. According to another view, by adopting the 2013 understanding, the Commission had placed the Special Rapporteur in an untenable position, as any realisable progress on the topic outside the parameters contained in the understanding depended on whether the interpretation to be given to it was a strict or flexible one. It was further pointed out that there was a fundamental problem with the understanding; the Special Rapporteur was presented with a dilemma, which effectively meant that practically all of the treaty practice on which the report was based could probably be subsumed under the subjects identified as not to be dealt with under the understanding. Some members viewed the understanding as unusual, and as setting a bad precedent for the Commission. Accordingly, it was suggested that the Commission could reconsider the understanding or agree on a flexible approach to its application.

88. Some other members stated that there was enough flexibility within the 2013 understanding for the Special Rapporteur to pursue a modest goal of identifying existing general principles of international environmental law, whether based on customary law or on general principles of law, and to declare their applicability to the protection of the atmosphere.

89. Viewing the whole task as not insurmountable, several members underlined the collegial and collective nature of the Commission's work and stressed the importance of taking a modest and sensible approach, as proposed by the Special Rapporteur, while affording him some leeway, mindful of the terms of the understanding. It had to be recognized that the most important decisions regarding the protection of the atmosphere were to be taken at the political level, and the Commission, in its work, could not be expected to prescribe or substitute for specific decisions and action at that political level.

90. Even though the Special Rapporteur had indicated in his report that he hoped to consider, in the remaining two years of the current quinquennium (2015 and 2016), questions relating to basic principles for the protection of the atmosphere, including the general obligations of States to protect the atmosphere, the *sic utere tuo ut alienum non laedas* principle, as well as principles of equity, sustainable development and good faith and, in the next quinquennium (2017–2021), to complete the consideration of other related matters, such as international cooperation, compliance with international norms, dispute settlement and interrelationships, some members expressed their concern that the whole picture was still not clearly discernible, as the information presented was not sufficient to give one a sense of the general orientation and direction of the topic. They sought a roadmap or workplan, which would set out the general objective of the project and identify the main problems, including the basic principles which should or might apply and their implementation, and raise questions that ought to be accorded priority by the Commission. It was suggested that such a roadmap could also detail how it was envisioned that the work of the Commission would be different from similar work done elsewhere, for example, the

work of the International Law Association on the legal principles relating to climate change.

91. Some members also expressed views on their differences with the methodological approaches taken by the Special Rapporteur in the treatment of the topic. Instead of focusing on the atmosphere as a global single unit and on its protection, an approach that seemed favoured by the Special Rapporteur in his report, it was suggested that attention should be paid on how the activities of State and non-State actors, which directly or indirectly affected the atmosphere, could be regulated. Such an alternative approach would focus not on the atmosphere *per se* but on the "rights and obligations" of States and such non-State actors in the field; this was viewed as the best guarantee for protection and conservation of the atmosphere and was more consistent with State practice and practical realities. Drawing analogies from the Law of the Sea, where the sea was divided into zones according to the degree of exercise by the coastal State of sovereignty or control, it was suggested that consideration be given to dividing the atmosphere in terms of parts thereof, which were subject to or beyond the sovereignty or control of the State. On the other hand, the approach taken by the Special Rapporteur was not entirely without support, as other members felt that given the threat to the atmosphere, its treatment as a single unit best assured its protection for the benefit of humankind.

92. Another methodological concern related to the treatment by the Special Rapporteur of the various sources which he stated were relevant to the consideration of the topic and his reliance on them. It was noted that, on occasion, the Special Rapporteur put almost complete faith on the views of non-governmental actors and scholars, without reference to State practice, and, where State practice was relied upon, there was no clear analysis of non-binding instruments as a source for determining *opinio juris*. It was also not apparent to some members how the catalogue of treaty practice and case-law cited in the report related to the topic and linked up with issues that the Special Rapporteur wanted to have addressed. Moreover, in some instances there was a sense that policy preferences were being made in the report as appropriate without being founded on any firm legal basis or meeting the rigours of their identification as law.

93. Members also expressed support for the possibility of consulting with technical and scientific experts in the development of the topic.

### (b) Comments on draft guideline 1: Use of terms

94. Some members agreed with the Special Rapporteur on the need for a definition for the purposes of the draft guidelines, which would correspond with the scientific definition of the atmosphere. It was noted that such a definition would facilitate the work of the Commission. Given the scientific nature of the topic, some other members suggested it might be more useful to develop a glossary of scientific terms to be used. Other members noted that the consideration of a definition at this stage might be premature; a certain period of time would offer an opportunity to engage the scientific community, effectively enabling the Commission to elaborate a definition that was legally and also scientifically sound. The point was also made that the definition ought to be comprehensive, without mentioning such terms as "troposphere" and "stratosphere".

95. According to another view, the necessity for a definition was questioned. It was noted, especially, that the various treaties that directly dealt with atmospheric issues such as long-range transboundary pollution, ozone depletion or climate change did not define the term "atmosphere". Similarly, the law of the sea convention does not define the sea.

96. Some members also pointed out that the content of the proposed definition was problematic. The definition proposed seemed to have no basis in State practice, case-law, or writings. Moreover, it was noted that the proposed definition included the troposphere and

stratosphere, but excluded, somewhat arbitrarily and without any apparent reason, the mesosphere, thermosphere, and exosphere, which also formed part of the atmosphere. Even accepting, as was scientifically known, that the three contemporary problems affecting the atmosphere — air pollution, ozone depletion and climate change — impacted only the troposphere and stratosphere, some members, on the basis of the precautionary principle, warned against an approach that parcelled out certain segments of the atmosphere. Attention was, for example, drawn to the study of climate change in the mesosphere conducted by the Antarctic Program of the Australian Government, which detected a manifestation of the greenhouse effect (enhanced cooling) in the stratosphere and mesosphere.[797] A point was also made that environmental harm could be caused in the upper atmosphere by satellites launched into outer space. Accordingly, a more general definition of the atmosphere that corresponded to the scientific identification of the atmosphere as consisting of the troposphere, stratosphere, mesosphere and thermosphere or related to the impact that the atmosphere had on human existence and the environment, was considered ideal.

97. Some members also observed that, by defining the atmosphere as "the layer of gases surrounding the earth in the troposphere and the stratosphere" the definition might have impliedly imposed an upper limit, thereby encroaching into questions relating to "outer space", including its delimitation, which are excluded from consideration by the terms of the 2013 understanding. The notion of "the gaseous envelope surrounding the Earth" employed by the Intergovernmental Panel on Climate Change (IPCC) was preferred by other members to the phrase "the layer of gases" to describe the atmosphere. Some members also questioned whether the concept "airborne substances" could alone properly be used to characterize the atmosphere. In terms of another view, it was crucial to embed in the definition the natural characteristics of the atmosphere, namely the idea of atmospheric circulation.

98. It was also noted that although the draft guidelines were not intended to affect the legal status of airspace under applicable international law, the proposed definition, by including its physical characteristics, implicitly signalled an upper limit of airspace.

99. The proposal was also made, while mindful of the 2013 understanding, to also define "air pollution", "ozone depletion" and "climate change" for the purposes of the draft guidelines, as well as "protection".

### (c) Comments on draft guideline 2: Scope of the guidelines

100. While some members found draft guideline 2 to be satisfactory, other members pointed to the need to address questions concerning the scope of the guidelines from a perspective of "cause and effect", given that the place of origin of the pollution is often different from the place where the adverse consequence is occasioned. To this end, a suggestion was made to formulate the draft guideline on scope, bearing in mind, for possible coverage, three spatial dimensions, namely territorial, transboundary and global, with focus being given on the latter two aspects. Since, with respect to atmospheric degradation, a clear identification of the cause and origin was not always possible, it was submitted that it would be appropriate to approach questions of protection from a standpoint that sought a restriction on hazardous substances, an approach pursued in existing instruments.

101. Regarding subparagraph (a), while some members agreed with its essence, particularly its reference to impact on both the human and the natural environment, the

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[797] See: http://www.antarctica.gov.au/about-antarctica/environment/atmosphere/studying-the-atmosphere/hydroxyl-airglow-temperature-observations/climate-change-in-the-mesosphere.

view was expressed that it was both too broad and too narrow, in that it seemed to cover a wide range of conceivable human activity, while at the same time establishing, in the latter part of the subparagraph, a high threshold. The inclusion of "energy", to the extent that it covered problems of radioactive or nuclear pollution, was also considered problematic by some members, given in particular that the peaceful uses of nuclear energy was regulated by special regimes. According to another view, subparagraph (a) was misleading as it also seemed to delve into matters of substance, due to the use of such terms as "deleterious substances" or "significant adverse effects". To cure such a defect, a suggestion was made to recast the draft guideline in broad terms to encompass all human activities affecting the atmosphere, with a view to ensuring its protection or to completely suppress the subparagraph.

102. Concerning subparagraph (b), it was noted by some members that the reference to "the basic principles relating to the protection of the atmosphere" risked bringing the scope of the draft guidelines in conflict with the understanding reached in 2013. The point was also made that the subparagraph seemed to relate more to the nature of the exercise than to scope. It was suggested that the goal should, without being prescriptive, be to develop guidelines upon which States may draw upon in their efforts to address problems concerning the atmosphere. Some other members supported the formulation of subparagraph (b), as it was also declaratory of a goal.

103. Some members viewed the references to "basic principles" as limiting and to "as well as to their interrelationship" as unclear and uncertain in relation to the draft guideline as a whole. Some other members even questioned the usefulness and timeliness of having a guideline on scope. It was noted in this regard, that the terms of the 2013 understanding should be borne in mind. In the light of the understanding's admonition not to deal with and not to prejudice such issues as the polluter-pays principle, the precautionary principle, and common but differentiated responsibilities, it was suggested that there should be a saving clause that would reflect the sense that the Commission, by not addressing such principles, was doing so without prejudice to their status in international law.

### (d) Comments on draft guideline 3: Legal Status of the Atmosphere

104. Draft guideline 3 elicited a diversity of comments from members on both the approach taken by the Special Rapporteur and on the substance of the draft guideline. In the main, some members doubted the grounding of the legal status of the atmosphere on the concept of common concern of humankind, as a legal concept, noting in particular that there was a risk that its existing position in international law was being overstated. As presently formulated, the draft guideline was viewed as broad and having far reaching implications.

105. There was a general sense among the members that more work might be needed to fully justify the propositions and policy choices that the Special Rapporteur makes in the draft guideline. In particular, in terms of approach, those members who felt that the Special Rapporteur should develop the draft guidelines in terms of rights and obligations of States were of the view that it was inconsistent with practice to view the atmosphere as integral or unified in relation to rights and obligations of States. Drawing from the law of the sea as well as case-law, such as the *Trail Smelter* award, it was considered important to view such rights and obligations in terms of sovereignty and control, which would entail, for example, that the atmosphere directly above a State should be dealt with in terms of sovereignty. From the report, it was not apparent why the Special Rapporteur had elected to deviate from an approach, established in practice, that assigned localized damage to the State in which the damage occurs or led to the invocation of the *sic utere tuo ut alienum non laedas* principle when there was transboundary damage. In this connection, it was wondered how the *sic utere tuo* principle would apply to "protection of the atmosphere". Some members,

on the other hand, aligned themselves with the Special Rapporteur in noting that the area-based approach for the protection of the marine environment under the United Nations Law of the Sea Convention could not be simply applied to the protection of the atmosphere as it was inappropriate and impractical, pointing to the difficulty of establishing national jurisdiction over any segment of the atmosphere. Further, it was noted that, even if the law of the sea were adopted as a model, problems had arisen in that area, particularly in relation to areas outside national jurisdiction where States Parties continue to have discussions and negotiations on the management of the shared resources of the oceans.

106. On the substance, some members welcomed the assertions in the report that the atmosphere was a natural resource; it was, however, doubted that practice evidenced that it was a resource that could be described as shared or common. It was noted by some members that the language of the draft Guideline had no basis in State or treaty practice or in any case-law. Moreover, the draft guideline did not seem to have anything to do with legal status of the atmosphere unless one ascribed meaning to the assertion that its protection was a "common concern of humankind." This was a concept whose normative content was unclear; it was not only controversial but also vague, given that it had a variety of interpretations, including the possibility that it created rights for individuals and future generations. Moreover, its application to the atmosphere did not seem to be supported in the practice of States.

107. In view of the paucity of practice, the treatment of the concept by the Special Rapporteur in the report was neither full nor comprehensive. It prematurely offered a text without providing a full analysis and implications, from a legal perspective, of the concept proposed. It did not, for instance, explore fully what legal implications were entailed by "common concern of humankind". A number of question arose: Is there a legal responsibility to prevent damage?; does that legal responsibility devolve to all States; does it create *erga omnes* obligations and would the responsibility of States be engaged thereby?; does it create obligations on society as a whole and on each individual member of the community; does it establish standing to sue, including an *actio popularis*?; does it create a duty of international environmental solidarity?; is the draft guideline not inadvertently diminishing the relevance of the *sic utere* principle? Although the Special Rapporteur hinted in the report that the concept would lead to the creation of substantive legal obligations on the part of all States to protect the global atmosphere as enforceable *erga omnes*, he did so without providing a full analysis. Several members also underlined that was it not the atmosphere *per se* but rather its protection that was a common concern of humankind. The point, however, was made that it the degradation of the conditions of the atmosphere should be an example of such concern.

108. Some other members indicated that the concept deserved favourable consideration, noting that the Commission could play a role in elucidating and articulating its scope with regard to the protection of the atmosphere. It was also suggested that there was merit in considering the concept as implying a need for international cooperation in the protection of the atmosphere, with the attendant duties of prevention and cooperation. It was also considered that, instead of focusing on the legal status of the atmosphere, attention should be on protection of the atmosphere as a common concern of humankind, and that the concept of "common concern" should form the basis of both a stand-alone guideline and a guideline articulating the basic principles relevant to atmospheric protection.

109. According to another viewpoint, the concept was too weak to be applied to the protection of the atmosphere. While some members were sympathetic to the possibility of reflecting the concept as applicable in relation to the protection of the atmosphere, it was still noted that the legal reasoning for such a preference in the report was scant. It was not clear, for example, why the concept of "common heritage of mankind" could not be ideal, without the "far-reaching institutional apparatus to control the allocation of exploitation

rights and benefits" that seemed to have prompted the Special Rapporteur to dismiss it. In this regard, attention was drawn to the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage and the 1997 Universal Declaration on the Human Genome and Human Rights which refer to "common heritage of mankind" but have no elaborate institutional structure. Indeed, some other members faulted the Special Rapporteur for dismissing rather quickly and without offering convincing reasons the possible application of the "common heritage of mankind" to the status of atmosphere.

110. Concerning paragraph (a) it was suggested that the reference to "aquatic and terrestrial ecosystems" be simplified.

111. As regards paragraph (b), the point was made that it was unnecessary. It was further understood that even if the legal status of airspace under applicable international law were not to be affected by the draft guidelines, it would not mean that the activities conducted in airspace would not be covered by the present project.

### (e) Other considerations

112. Several members welcomed the indication by the Special Rapporteur that he would focus on cooperative mechanisms to address issues of common concern, and urged that this aspect be given priority. In the view of some members, there should also be some consideration of the obligations of States regarding not only the preservation but also the conservation of the atmosphere, and of the relationship between the already established rules of customary international environmental law and the regulation of the atmosphere, including the no harm and prevention principles, as well as principles of sustainable development.

113. In view of the fact that the International Court of Justice in the *Pulp Mills* case[798] stated that undertaking an environmental impact assessment whenever there was a risk that the proposed activity may have significant adverse impact in a transboundary context had to be considered a requirement under general international law, the Commission could also make a meaningful contribution by *inter alia* addressing all aspects relating to the content of the obligation in relation to the topic.

114. It also suggested that the Commission, in addressing considerations of equity, could draw upon principles 6,[799] 9[800] and 11[801] of the Stockholm Declaration on the Human Environment in the treatment of the topic.

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[798] *Pulp Mills on the River Uruguay (Uruguay v. Argentina), Judgment, I.C.J. Reports 2012*, p. 14, at pp. 82–83, para. 204. See also *In the matter of the Indus Waters Kishenganga Arbitration before the Court of Arbitration constituted in accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan signed on 19 September 1960 between the Islamic Republic of Pakistan and the Republic of India, Partial award of 13 February 2013*, available at www.pca-cpa.org (visited on 27 May 2014).

[799] Principle 6 reads as follows:

> The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of ill countries against pollution should be supported.

[800] Principle 9 reads as follows:

> Environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.

[801] Principle 11 reads as follows:

115. Some members expressed a preference for an alternative approach that would seek to identify specific "practice pointers", concretely grounded in State practice, that might be useful to policymakers as they grapple with problems relating to the atmosphere. In such an approach, draft guidelines could focus on such issues as cooperation among States at the global, regional, and bilateral levels, and the various approaches, frameworks and techniques that States pursue to enhance cooperative arrangements.

### 3. Concluding remarks of the Special Rapporteur

116. The Special Rapporteur welcomed the helpful comments, suggestions and constructive criticisms made by members. He reiterated the importance of the Commission addressing the topic in a modest and sensible manner, while agreeing with sentiments that consultations with the scientific community would benefit the Commission in its work. To this end, he expressed his intention to explore the possibility of organizing a briefing session for 2015. He also noted that he was inclined to defer referral of the draft guidelines to the Drafting Committee until next year, as he would be afforded an opportunity to reformulate parts thereof in the light of the comments made.

117. The Special Rapporteur acknowledged the wide ranging opinions of members on the 2013 understanding. He stressed in particular that he did not envisage any conflict with his treatment of the topic, in particular the focus on the air pollution, ozone depletion and climate change, with political negotiations. Advocating a middle-of-the road approach, he noted that there was no need to discard the understanding since it was the basis for the Commission's decision to take up the topic last year. At the same time, he expressed the hope that the Special Rapporteur would be given the flexibility to identify issues relevant to the topic in a manner that assists the Commission to make progress in its consideration.

118. The Special Rapporteur also noted that in paragraph 92 of his report he had provided a complete plan of work on the topic, and acknowledged the importance of international cooperation as the key element of atmospheric protection. In his second report he intended to address the substance of the responsibilities of States with regard to protection of the atmosphere.

119. As regards draft guideline 1, the Special Rapporteur emphasized that it was intended to be a working definition for purposes of the draft articles, proposed as a matter of practical necessity, given that the existing instruments had not defined the atmosphere. He pointed out that his focus in the definition to the troposphere and the stratosphere was not arbitrary. Since the upper atmosphere comprises only 0.0002% of the atmosphere's total mass, he considered it an insignificant portion to be excluded from coverage. Moreover, there was no meaningful evidence that climate change contributed to, or was responsible for, changes in the conditions of the mesosphere or thermosphere. He expressed doubt that the study of "climate change" in the mesosphere conducted by the Antarctic Program of the Australian government, which related to "solar flux", or the measure of the activity of the sun over the same period of time, specifically linked the changes that were detected "directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability" – the definition of climate change adopted in the UNFCCC. Moreover, the Special Rapporteur acknowledged that there was limited understanding of changes in the upper atmosphere due to lack of

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The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

scientific data. However, in his view, to formulate a protective regime for that area would be overly ambitious. Regarding the potential harm by satellites, the Special Rapporteur recalled that the environmental protection of outer space, including the question of space debris, is a subject within the purview of the Committee on the Peaceful Uses of Outer Space (COPUOS). The Special Rapporteur also underscored that airspace and the atmosphere, under international law, were two entirely different concepts. Accordingly, defining the limits of the atmosphere did not have implications for the borders of national airspace or of outer space. He nevertheless expressed a willingness to remove the reference to the troposphere and stratosphere from the definition in draft guideline 1, provided that any commentary would further clarify the atmosphere's relationship to outer space.

120. Concerning draft guideline 2, the Special Rapporteur confirmed that the focus of the project would be harm that has a transboundary or a global impact. He stated that the use of phrases like "deleterious substances", which "have or are likely to have significant adverse effects", is intended to appropriately limit the range of human activities and deleterious substances with which the draft guidelines are concerned. The Special Rapporteur recalled that the Commission has used substantive concepts in definitional provisions, as well as "significant" in its prior work. This was the case, for instance, with the Articles on the Prevention of Transboundary Harm from Hazardous Activities. The Commission has noted that "significant" was a factual and objective determination, involving a value determination which depended on the circumstances of a particular case; it meant something more than "detectable" but need not be at the level of "serious" or "substantial". The Special Rapporteur also noted that the inclusion of "energy" in the proposed definition corresponded to the definition contained in the Convention on Long-Range Transboundary Air Pollution, as well as the Law of the Sea Convention. Its inclusion was not intended to interfere with the policies of States with respect to nuclear energy and its use.

121. With respect to draft guideline 3, the Special Rapporteur confirmed that it was not the atmosphere but rather the *protection* of the atmosphere that was a common concern. Its scope was intended to be narrow, applied to establish a cooperative framework for atmospheric protection and not to establish common ownership or management of the atmosphere. It created substantive obligations of environmental protection, in addition to those already recognized by customary international law. He confirmed his belief that there was a close link between *erga omnes* obligations, and their enforcement, and the notion of "common concern", whose aspects, including the related concept of *actio popularis*, would be further explored in future reports. In his view, law-making was both inductive and deductive. It was the task of the Commission to explore the legal obligations that may be contained in the notion of "common concern", which was not devoid of normative content, and to articulate those obligations as part of the draft guidelines. He agreed with those members who said that the notion of "common concern" implied a duty to cooperate to ensure that the atmosphere was protected for future generations. He also did not see any obstacle in extending the *sic utere tuo* principle to atmospheric protection, given that its application was not limited to harm in bilateral transboundary context; both the United Nations Framework Convention (eighth preambular paragraph) and the Vienna Convention on the Protection of the Ozone Layer (art. 2 (2) (b)) have recognized the principle. The Special Rapporteur also noted that he was not fundamentally opposed to using the concept of "common heritage" to atmospheric protection, if the Commission opted for it for the project.

122. The Special Rapporteur also stressed the importance of viewing the atmosphere as a comprehensive single unit, not subject to division along State lines. It was fluid and dynamic such that it would be impractical, if not impossible, for purpose of the project, to divide it in terms of the air that was under the territorial jurisdiction and control of one State from the air that is outside that jurisdiction.

# Chapter IX
# Immunity of State officials from foreign criminal jurisdiction

## A. Introduction

123. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[802] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session.[803]

124. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[804] The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[805]

125. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission. The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012) and her second report during the sixty-fifth session (2013).[806] On the basis of draft articles proposed by the Special Rapporteur in the second report, the Commission provisionally adopted three draft articles, together with commentaries thereto, during same session.[807]

## B. Consideration of the topic at the present session

126. The Commission had before it the third report of the Special Rapporteur (A/CN.4/673). The Commission considered the report at its 3217th to 3222nd meetings, from 7 to 11 July 2014.

127. In her third report, the Special Rapporteur commenced with an analysis of the normative elements of immunity *ratione materiae*, focusing on those aspects related to the subjective element. In this context, as was announced at the previous session of the Commission, the general concept of a "State official" was examined in the report, and the

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[802] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in para. 7 of res. 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[803] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[804] A/CN.4/601 (preliminary report); A/CN.4/631 (second report); and A/CN.4/646 (third report).

[805] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[806] A/CN.4/654 (preliminary report) and A/CN.4/661 (second report).

[807] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48 and 49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted three draft articles and at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto.

substantive criteria that could be used to identify such persons were considered, especially in respect of those who may enjoy immunity *ratione materiae* from foreign criminal jurisdiction. The report further considered a linguistic point concerning the choice of the most suitable term for designating persons who enjoy immunity, given the terminological difficulties posed by the term "official" and its equivalents in the various languages, and suggested instead that "organ" be employed. Following an analysis of relevant national and international judicial practice, treaty practice and the previous work of the Commission, the Special Rapporteur proposed two draft articles relating to the general concept of "an official" for the purposes of the draft articles and the subjective scope of immunity *ratione materiae*. It was envisaged that the material and temporal scope of immunity *ratione materiae* would be the subject of consideration in the Special Rapporteur's next report.

128. Following its debate on the third report of the Special Rapporteur, the Commission, at its 3222nd meeting, on 11 July 2014, decided to refer the draft articles to the Drafting Committee.

129. At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 (see section C.1 below).

130. At its 3240th to 3242nd meetings, on 6 and 7 August 2014, the Commission adopted the commentaries to the draft articles provisionally adopted at the present session (see section C.2 below).

## C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

### 1. Text of the draft articles

131. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.[808]

**Part One**
**Introduction**

**Article 1**
**Scope of the present draft articles**

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

**Article 2**
**Definitions**

**For the purposes of the present draft articles:**

...

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[808] For the commentaries to draft articles 1, 3 and 4, see *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 49.

**(e) "State official" means any individual who represents the State or who exercises State functions.**

### Part Two
### Immunity *ratione personae*

### Article 3
### Persons enjoying immunity *ratione personae*

**Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.**

### Article 4
### Scope of immunity *ratione personae*

**1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.**

**2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.**

**3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.**

### Part Three
### Immunity *ratione materiae*

### Article 5
### Persons enjoying immunity *ratione materiae*

**State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.**

## 2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session

132. The text of the draft articles, together with commentaries, provisionally adopted by the Commission at the sixty-sixth session, is reproduced below.

### Article 2
### Definitions

For the purposes of the present draft articles:

…

(e) "State official" means any individual who represents the State or who exercises State functions.

### Commentary

(1) The purpose of draft article 2, paragraph (e), is to define the persons to whom the present draft articles apply, namely "State officials". Defining the concept of State official helps to understand one of the normative elements of immunity: the individuals who enjoy immunity. Most members of the Commission thought it would be useful to have a definition of State official for the purposes of the present draft articles, given that immunity from foreign criminal jurisdiction is applicable to individuals. Several members of the Commission expressed doubts about the need to include this definition.

(2) The definition of the term "State official" contained in draft article 2, subparagraph (e), is general in nature, applicable to any person who enjoys immunity from foreign

criminal jurisdiction under the present draft articles, either immunity *ratione personae* or immunity *ratione materiae*. Consequently, the nature and object of draft article 2, subparagraph (e), must not be confused with the nature and object of draft articles 3 and 5, which define who enjoys each category of immunity.[809] The persons who enjoy immunity *ratione personae* and immunity *ratione materiae* both fall within the definition of "State official", which is common to both categories.

(3) There is no general definition in international law of the term "State official" or "official", although both terms may be found in certain international treaties and instruments.[810] The term "State official", or simply "official", can mean different things in different domestic legal systems. Consequently, the definition of "State official" referred to in this commentary is autonomous, and must be understood to be for the purposes of the present draft articles.

(4) The definition of "State official" uses the term "individual" to indicate that the present draft articles cover only natural persons. The present draft articles are without prejudice to the rules applicable to legal persons.

(5) As indicated above, the term "State official" must be understood as encompassing persons who enjoy immunity *ratione personae* and those who enjoy immunity *ratione materiae*. In this connection, it must be noted that the Commission identified the persons who enjoy immunity *ratione personae* by listing the individuals cited *eo nomine* in draft article 3, namely: the Head of State, the Head of Government and the Minister for Foreign Affairs. However, it has been decided not to mention them expressly in draft article 2, subparagraph (e), since they are deemed to be, *per se*, State officials in the sense of the present draft articles; accordingly, they need not be differentiated from other State officials for the purposes of the definition.

(6) As regards the "State officials" to whom immunity *ratione materiae* is applicable, the Commission considers that it cannot use the technique of identification *eo nomine*. In view of both the diversity of the positions of the individuals to whom immunity may apply and of the variety of national legal systems that determine which persons are their officials, the Commission does not consider it possible to draw up an exhaustive list that would include all the individuals covered by immunity *ratione materiae*. For the same reasons, the Commission has also considered it neither possible nor suitable to draw up an indicative list in a draft article of the positions of those individuals to whom such immunity may apply. In both cases, the list would inevitably be incomplete, since all the positions of the State officials included in domestic legal systems cannot be catalogued and the list would have to be constantly updated and might be confusing for the government institutions responsible

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[809] Draft article 3 states that "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction" (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/68/10), para. 48, p. 52). Draft article 5 states that "State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction" (A/CN.4/L.850).

[810] The terms are used in the following multilateral treaties: Vienna Convention on Diplomatic Relations; Vienna Convention on Consular Relations; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; Convention on the Prevention and Punishment of the Crime of Genocide; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations Convention against Corruption; Criminal Law Convention on Corruption (Council of Europe); Inter-American Convention against Corruption; African Union Convention on Preventing and Combating Corruption. For an analysis of these instruments for the purposes of defining "State official", see the third report on the immunity of State officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/673, paras. 51–97.

for applying immunity from foreign criminal jurisdiction. Accordingly, the individuals who may be termed "State officials" for the purposes of immunity *ratione materiae* must be identified on a case-by-case basis, applying the criteria included in the definition and which point to a specific link between the State and the official, namely: representation of the State or the exercise of State functions.

(7) Nevertheless, by way of example, the following "State officials" have appeared in national and international caselaw regarding immunity from jurisdiction: a former Head of State; a Minister of Defence and a former Minister of Defence; a Vice-president and Minister of Forestry; a Minister of Interior; an Attorney-General and a General Prosecutor; a Head of National Security; a former Intelligent Service Chief; a director of a Maritime Authority; an Attorney-General and various lower-ranking officials of a federal State (a prosecutor and his legal assistants, a detective in the Attorney-General´s office and a lawyer in a State agency); military officials of various ranks, and various members of government security forces and institutions, including the Director of Scotland Yard; border guards; the deputy director of a prison; and the Head of a State archives.[811]

(8) Attention must be drawn to the fact that the Head of State, Head of Government and Minister for Foreign Affairs may enjoy both immunity *ratione personae* and immunity *ratione materiae* in accordance with the present draft articles. The first hypothesis is specifically envisaged in draft article 3, provisionally adopted by the Commission at its

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[811] See: *Association des familles des victimes du Joola, Cour de Cassation, Chambre criminelle* (France), judgement of 19 January 2010; *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, House of Lords (United Kingdom), judgement of 14 June 2006; *Agent judiciaire du trésor v. Malta Maritime Authority et Carmel X, Cour de cassation, Chambre criminelle* (France), judgement of 23 November 2004; *Norburt Schmidt v. Home Secretary of the Government of the United Kingdom*, Supreme Court (Ireland), judgement of 24 April 1997; *Church of Scientology*, Federal Supreme Court (Germany), judgement of 16 September 1978; *Teodoro Nguema Obiang Mangue et al., Cour d'appel de Paris, Deuxième chambre de l'instruction* (France), judgement of 13 June 2013; *A. v. Office of the Attorney-General of Switzerland*, Federal Criminal Tribunal (Switzerland), judgement of 25 July 2012; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, House of Lords (United Kingdom), judgement of 24 March 1999; *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court of Justice, Queen's Bench Division Administrative Court (United Kingdom), judgement of 29 July 2011; *Public Prosecutor (Tribunal of Milan) v. Adler et al.*, Tribunal of Milan, *Quarta Sezione Penale* (Italy), judgement of 1 February 2010; *United States of America v. Noriega*, Court of Appeals, Eleventh Circuit (United States of America), judgement of 7 July 1997; *Border Guards Prosecution*, Federal Supreme Court (Germany), judgement of 3 November 1992; *In re Doe*, Court of Appeals, Second Circuit (United States of America), judgement of 19 October 1988; *R. v. Lambeth Justices ex-parte Yusufu*, Divisional Court (United Kingdom), judgement of 8 February 1985; *Estate of the late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi v. the Islamic Republic of Iran, Ayatollah Ali Khamenei, Saeed Mortazavi and Mohamad Bakhsi*, Superior Court, Commercial Division (Canada), judgement of 25 January 2011; *Ali Saadallah Belhas et al., Appelants v. Moshe Ya'alon*, Court of Appeals for the District of Columbia Circuit (United States of America), judgement of 15 February 2008; *Ra'Ed Mohamad Ibrahim Matar, et al. v. Avraham Dichter*, District Court, Southern District of New York (United States of America), judgement of 2 May 2007; *A, B, C, D, E, F and Others Similarly Situated, Wei Ye, and Hao Wang v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10)*, Court of Appeals, Seventh Circuit (United States of America), judgement of 8 September 2004; *Jaffe v. Miller and others*, Ontario Court of Appeals (Canada), judgement of 17 June 1993; *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court of the State of New York (United States of America), judgement of 31 October 1988; *Certains Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgement, I.C.J. Reports 2008*, p. 177; *Jones and others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, European Court of Human Rights judgement of 14 January 2014; *Prosecutor v. Tihomir Blaskic*, IT-95-14-AR 108, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, judgement of 29 October 1997.

sixty-fifth session. The second is reflected in draft article 4, paragraph 3, likewise provisionally adopted by the Commission at the same session, according to which "the cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*".[812] The conditions under which the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* or immunity *ratione materiae* will depend on the rules applicable to each of these categories of immunity that are contained in other provisions of the present draft articles.[813]

(9) The definition of "State official," it must be noted, refers solely to the person who enjoys immunity, without prejudging or implying any statement about the question of what are the acts that may be covered by immunity from foreign criminal jurisdiction. From this standpoint, the essential element to be taken into account in identifying an individual as a State official for the purposes of the present draft articles is the existence of a link between that person and the State. This link is reflected in draft article 2, subparagraph (e), through the reference to the fact that the individual in question "represents the State or […] exercises State functions." This is a clear and simple statement regarding the criteria for identifying what constitutes an official,[814] and reiterating the proposition that the Commission accepted in 2013, namely that the present draft articles relate to "the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of a State".[815] Lastly, attention must be drawn to the fact that a State official may fulfil both requirements or only one of them.

(10) The phrase "who represents" must be understood in a broad sense, as including any "State official" who performs representational functions. The reference to representation is of special importance with regard to the Head of State, Head of Government and Minister for Foreign Affairs because — as the commentary to draft article 3 states — "these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State."[816] However, the reference to representation of the State may also be applicable to State officials other than the so-called "troika," in conformity with the rules or acts of the national systems themselves. Consequently, whether an official is representing the State or not must be determined on a case-by-case basis. Lastly, it must be noted that the separate reference to representation of the State as one of the criteria for identifying a link with the State makes it possible to cover certain persons, such as those Heads of State who typically

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[812] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, para. 48, p. 52.

[813] In this connection, it must be recalled that paragraph (7) of the commentary to draft article 4 says: "The Commission considers that the 'without prejudice' clause simply leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by a former Head of State, Head of Government or Minister for Foreign Affairs when the rules governing that category of immunity make this possible. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which will be developed in Part III of the draft articles." (*Official Records of the General Assembly, Sixty-eighth Session*, A/68/10, para. 49, p. 70).

[814] See A/CN.4/673, para. 111, p. 37, and the draft article initially proposed by the Special Rapporteur (*ibid.*, para. 143, p. 53).

[815] See para. (4) of the commentary to draft article 1, provisionally adopted by the Commission at its sixty-fifth session (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, para. 49, p. 53).

[816] See para. (2) of the commentary to draft article 3, provisionally adopted by the Commission at its sixty-fifth session (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, para. 49, p. 58).

do not perform State functions in a narrow sense, but who most certainly represent the State.

(11) "State functions" must be understood, in a broad sense, to mean the activities carried out by the State. This designation includes the legislative, judicial, executive or other functions performed by the State. Consequently, the "State official" is the individual who is in a position to perform these State functions. The reference to the exercise of State functions defines more precisely the requisite link between the official and the State, allowing for sufficient account to be taken that immunity is granted to the individual for the benefit of the State. Although various terms, such as "prerogatives of public power," "public functions," "sovereign authority," "governmental authority" or "inherent functions of the State" have been suggested in order to reflect this idea, the Commission has chosen the term "State functions" as being the most suitable at the current stage of work. This choice has been made for two reasons: first, it reflects sufficiently well the link between the State and the official, which is related to the latter's duties; and secondly, the use of the term "functions" rather than "acts performed in the name of the State" avoids potential confusion between the subjective (the official) and objective (the act) elements of immunity. At the current stage of the Commission's work, in any case, these terms should be understood in the broadest sense possible, keeping in mind that the exact content of what "State functions" may be depends to a large extent on the laws and organizational capacity of the State. Some Commission members stated, however, that the phrase chosen was infelicitous.

(12) It is to be noted that the use of the terms "represents" and "exercises" in this draft article must not be interpreted as making any statement about the temporal scope of immunity. It is motivated by the intention to identify in general terms the link between the State and the official, and has no bearing on whether the State official must continue to be one at the time when immunity is claimed. The temporal scope of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles.

(13) For the purposes of defining "State official," what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State. However, the majority of Commission members are of the view that the link cannot be interpreted so broadly as to cover all *de facto* officials. The term *de facto* official is used to refer to many possible cases, and it will depend on each specific case whether or not the individual may be considered a State official for the purposes of the present draft articles. In any event, issues relating to *de facto* officials may be more appropriately addressed in connection with a definition of "act performed in an official capacity".

(14) Given that the concept of "State official" rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the individual is irrelevant for the sole purposes of the definition. Although in many cases, the persons who have been recognized as State officials for the purposes of immunity hold a high or middle rank, it is also possible to find examples of such persons at a low level of the hierarchy. Consequently, the hierarchical level is not an integral part of the definition of State official.

(15) Lastly, it must be borne in mind that the definition of "State official" has no bearing on the type of acts covered by immunity. Consequently, the terms "represent" and "exercise State functions" may not be interpreted as defining in any way the substantive scope of immunity. Similarly, the definition of "State official" cannot be interpreted as containing a statement about exceptions to immunity. These two issues will be taken up at a later date.

(16) As to the question of terminology, at the present stage of the work on the immunity of State officials from foreign criminal jurisdiction, the Commission has not considered it necessary to change the terms used to refer to persons who enjoy immunity. Consequently, the terms "State official" in English, "*représentant de l'Etat*" in French, "*funcionario del Estado*" in Spanish, "مسؤول الدولة" in Arabic, "国家官员" in Chinese and "должностное лицо государства" in Russian continue to be employed. Although the Commission is aware that they do not necessarily mean the same thing and are not interchangeable, it has preferred to continue using these terms, especially since the term "State official" in English, used extensively in practice, is suitable for referring to all the categories of persons to which the present draft articles refer. Thus, the fact that different terms are used in each of the language versions is of no semantic significance whatsoever. Rather, the various terms used in each of the language versions have the same meaning for the purposes of the present draft articles and have no bearing on the meaning that each term may have in domestic legal systems. The Commission will decide in due course whether a change needs to be made or a saving clause added with respect to the use of these terms in domestic law or international instruments, so as to ensure that institutions charged with applying immunity at the national level correctly interpret the term "State official" as set out in the present draft articles.

### Article 5
### Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

### Commentary

(1) Draft article 5 is the first of the draft articles on immunity *ratione materiae* and is intended to define the subjective scope of this category of immunity from foreign criminal jurisdiction. Consequently, this draft article parallels draft article 3, on persons enjoying immunity *ratione personae*. It has the same structure, and it uses, *mutatis mutandis*, the same wording and the terminology already agreed on by the Commission concerning the latter draft article. There is no list of actual persons who enjoy immunity; instead in the case of immunity *ratione materiae* they have been referred to as "State officials acting as such".

(2) The expression "State officials", as used in this draft article, is to be understood in the sense given to it in draft article 2, subparagraph (e), namely: "any individual who represents the State or who exercises State functions". In contrast to the situation with persons enjoying immunity *ratione personae*, the Commission did not consider it possible, in the present draft articles, to draw up a list of persons enjoying immunity *ratione materiae*. Rather, the persons in this category must be identified on a case-by-case basis, by applying the criteria set out in draft article 2, subparagraph (e), which highlight the existence of a link between the official and the State. The commentary to draft article 2, subparagraph (e), must be duly kept in mind for the purposes of the present draft article.[817]

(3) The phrase "acting as such" refers to the official nature of the acts of the officials, emphasizing the functional nature of immunity *ratione materiae* and establishing a distinction with immunity *ratione personae*. In view of the functional nature of immunity *ratione materiae*, some members of the Commission have expressed doubts about the need to define the persons who enjoy it, since in their view, the essence of immunity *ratione materiae* is the nature of the acts performed and not the individual who performs them. Nevertheless, the majority of members of the Commission thought it would be useful to

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[817] See above, paras. (1)–(16) of the commentary to draft article 2, subparagraph (e).

identify the persons in this category of immunity, since immunity from foreign criminal jurisdiction applies to these individuals. The reference to the fact that the "State officials" must have acted "as such" in order to enjoy immunity *ratione materiae* says nothing about the acts that might be covered by such immunity, which are to be covered in a separate draft article. For the same reason, the expression "acting in an official capacity" has not been used, to avoid potential confusion with the concept of an "act performed in an official capacity".

(4) In conformity with draft article 4, paragraph 3, provisionally adopted by the Commission in 2013,[818] immunity *ratione materiae* also applies to former Head of States, Heads of Government and Ministers for Foreign Affairs "when they have acted in the capacity of State officials". Nevertheless, the Commission does not consider it necessary to refer explicitly to those officials in the present draft article, since immunity *ratione materiae* applies to them, not because of their status, but in view of the fact that they are State officials who have acted as such during their term of office. Even though the Commission considers that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione materiae stricto sensu* only once they have left office, there is no need to mention this in draft article 5. The matter will be covered more fully in a future draft article on the substantive and temporal scope of immunity *ratione materiae*, to be modelled on draft article 4.

(5) Draft article 5 is without prejudice to exceptions to immunity *ratione materiae*, likewise to be taken up at a later date.

(6) Lastly, attention must be drawn to the fact that draft article 5 uses the expression "from the exercise of foreign criminal jurisdiction," as does draft article 3, to refer to persons enjoying immunity *ratione personae*. This expression illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of foreign criminal jurisdiction with respect to a specific act.[819]

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[818] This provision reads: "The cessation of immunity *ratione materiae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*" (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, para. 48, p. 52). Concerning the scope of this "without prejudice" clause, see para. (7) of the commentary to draft article 4 (*ibid.*, para. 49, p. 70).

[819] See para. (13) of the commentary to draft article 3 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, para. 49, p. 66).

# Chapter X
# Identification of customary international law

## A. Introduction

133. At its sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Mr. Michael Wood as Special Rapporteur.[820] At the same session, the Commission had before it a Note by the Special Rapporteur (A/CN.4/653).[821] Also at the same session, the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic.[822]

134. At its sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/663), as well as a memorandum of the Secretariat on the topic (A/CN.4/659).[823] At the same session, the Commission decided to change the title of the topic to "Identification of customary international law".

## B. Consideration of the topic at the present session

135. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/672). The Commission considered the report at its 3222nd to 3227th meetings, from 11 to 18 July 2014.

136. At its 3227th meeting, on 18 July 2014, the Commission referred draft conclusions 1 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. At the 3242nd meeting of the Commission, on 7 August 2014, the Chairman of the Drafting Committee presented the interim report of the Drafting Committee on "Identification of customary international law", containing the eight draft conclusions provisionally adopted by the Drafting Committee at the sixty-sixth session. The report, together with the draft conclusions, was presented for information only at this stage, and is available on the Commission website.[824]

### 1. Introduction by the Special Rapporteur of the second report

137. The second report focused on the two constituent elements of rules of customary international law: "a general practice" and "accepted as law". The report proposed 11 draft

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[820] At its 3132nd meeting, on 22 May 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 157). The General Assembly, in paragraph 7 of its resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex A to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), pp. 305–314).

[821] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 157–202.

[822] *Ibid.*, para. 159.

[823] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 64.

[824] Located at www.un.org/law/ilc.

conclusions, divided into 4 parts ("introduction"; "two constituent elements"; "a general practice"; "accepted as law").

138. After recalling the history of the topic, the first part of the report presented the scope and planned outcome of the work. The extent and limits of the scope of the draft conclusions were the subject of draft conclusion 1,[825] and some of the terms that it might be useful to define for purposes of the work were reflected in draft conclusion 2.[826] The report then proceeded to the heart of the topic in its second part, namely the basic approach to the identification of customary international law. Draft conclusion 3 presented a clear statement of the two-element approach,[827] and draft conclusion 4 constituted a general provision on the assessment of evidence for such purpose.[828] The two elements were dealt with in more detail in the next two parts, respectively. The third part included five draft conclusions relating to the nature and evidence of "a general practice", namely the role of practice (draft conclusion 5), the attribution of conduct (draft conclusion 6), the forms of practice (draft conclusion 7), the weighing of evidence of practice (draft conclusion 8) and the generality and consistency of practice (draft conclusion 9).[829] Thereafter, in the fourth part, the second

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[825] Draft conclusion 1 read as follows:

***Scope***

1. The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.

2. The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (*jus cogens*).

[826] Draft conclusion 2 read as follows:

***Use of terms***

For the purposes of the present draft conclusions:

(a) "Customary international law" means those rules of international law that derive from and reflect a general practice accepted as law;

(b) "International organization" means an intergovernmental organization;

(c) …

[827] Draft conclusion 3 read as follows:

***Basic approach***

To determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law.

[828] Draft conclusion 4 read as follows:

***Assessment of evidence***

In assessing evidence for a general practice accepted as law, regard must be had to the context, including the surrounding circumstances.

[829] Part three (draft conclusions 5 through 9) read as follows:

**A general practice**

Draft conclusion 5

***Role of practice***

The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.

Draft conclusion 6

***Attribution of conduct***

State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function.

of the two elements, "accepted as law", was addressed in two draft conclusions on the role and evidence of acceptance of law (draft conclusions 10 and 11 respectively).[830]

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Draft conclusion 7

***Forms of practice***

1. Practice may take a wide range of forms. It includes both physical and verbal actions.

2. Manifestations of practice include, among others, the conduct of States "on the ground", diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties and acts in connection with resolutions of organs of international organizations and conferences.

3. Inaction may also serve as practice.

4. The acts (including inaction) of international organizations may also serve as practice.

Draft conclusion 8

***Weighing evidence of practice***

1. There is no predetermined hierarchy among the various forms of practice.

2. Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice.

Draft conclusion 9

***Practice must be general and consistent***

1. To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.

2. The practice must be generally consistent.

3. Provided that the practice is sufficiently general and consistent, no particular duration is required.

4. In assessing practice, due regard is to be given to the practice of States whose interests are specially affected.

[830] Part four (draft conclusions 10 and 11) read as follows:

**Accepted as law**

Draft conclusion 10

***Role of acceptance as law***

1. The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.

2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.

Draft conclusion 11

***Evidence of acceptance as law***

1. Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.

2. The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of Government legal advisers, official publications in fields of international law, treaty practice and action in connection with resolutions of organs of international organizations and of international conferences.

3. Inaction may also serve as evidence of acceptance as law.

139. In his introduction, the Special Rapporteur recalled aspects of the discussions on the scope and outcome of the topic at the 2013 session of the Commission. He noted, in particular, that the outcome of the topic was presently intended to be "conclusions" with commentaries, an outcome which was widely supported in the Commission and in the Sixth Committee. Nevertheless, the final form could be kept under review as the work on the topic progresses. The Special Rapporteur also noted that he did not intend to deal with general principles of law or *jus cogens* as part of this topic.

140. The Special Rapporteur recalled that the objective of the topic, as was noted in the first part of the report, was not to determine the substance of the rules of customary international law, but rather to address the methodological question of the identification of the existence and content of rules of customary international law.

141. The core of the second report was the two-element approach to the identification of rules of customary international law. The Special Rapporteur noted that this approach was widely followed in the practice of States and in the decisions of international courts and tribunals, including the International Court of Justice, and had been welcomed in the Sixth Committee. It was also generally endorsed in the literature. He also recalled the view with regard to certain fields of international law, such as international human rights law and international humanitarian law, that one element, namely *opinio juris*, might suffice to establish a rule of customary international law, stressing that this view was not supported by State practice or the case-law of the International Court of Justice. The Special Rapporteur noted, however, that there may be differences in the application of the two-element approach in different fields or with respect to different types of rules.

142. After addressing the basic aspects of the two-element approach, the report proceeded to a more detailed consideration of each of the two elements. Starting with the first element, "a general practice", the Special Rapporteur indicated that this term was preferable to "State practice" as it reflected the language of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice and allowed for the fact that the practice of international organizations may also be relevant. It was also noted that the draft conclusion on the role of practice, which proposed that it was "primarily" the practice of States that contributes to the creation or expression of rules of customary international law, borrowed, in part, from the language of the jurisprudence of the International Court of Justice. The draft conclusion on the question of attribution proposed in the report was based, to a large extent, upon the articles on the responsibility of States for internationally wrongful acts.

143. The report also dealt at some length with what may be termed "manifestations of practice", namely the acts or omissions that may be relevant to the ascertainment of "a general practice". The Special Rapporteur drew attention to six points relating to this part of the report. First, practice may consist of verbal acts as well as physical acts. Second, an indicative list of the forms of practice was useful, in particular given the overall aim of the topic, though any such list was bound to be n[illegible]haustive. Third, many of the types of practice listed may also serve as eviden[illegible]e as law. Fourth, practice embodied in treaties and resolutions of organs o[illegible] organizations constitute two important forms of practice and would be covere[illegible]epth in the next report. Fifth, the practical importance of inaction, or silence, sh[illegible]be overlooked. Finally, the practice of certain international organizations may be of increasing importance, although it ought to be assessed with caution.

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4. The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law.

144. The Special Rapporteur stated that there was no predetermined hierarchy among the various forms of practice and that account should be taken of all available practice of a particular State. Moreover, practice must be general and consistent. To be general, the practice must be sufficiently widespread and representative, though it need not be universal. Where these conditions are met, no particular minimum duration would be required. In addition, due regard is to be given to the practice of States whose interests are specially affected.

145. Turning to the second of the two elements, "accepted as law", the Special Rapporteur stressed that many of the difficulties typically associated with this element have been theoretical rather than practical. For a general practice to be accepted as law means that the practice in question must be accompanied by a sense of legal obligation. It is that which distinguishes a rule of customary international law from mere habit or usage. It was also suggested that using the term "accepted as law", borrowed from the language of the Statute of the International Court of Justice, would be preferable to the term *opinio juris* or to other terms used in the jurisprudence, since it better describes what happens in practice than other expressions in common use. Using "accepted as law" would also avoid the need to interpret the Latin expression "*opinio juris sive necessitatis*", which remains debatable.

146. The report then proceeded to address the critical question of how acceptance of law (or the lack thereof) may be evidenced. It concluded that such acceptance may be indicated by or inferred from practice, though it was stressed that the subjective element was, nevertheless, a requirement distinct from "general practice", which must be separately identified in each case. The Special Rapporteur indicated that another draft conclusion may be needed to further clarify this point. As with "practice", it was also noted that evidence of "acceptance as law" may take a variety of forms, and the report provided an indicative, non-exhaustive, list of such forms.

147. The Special Rapporteur expressed his deep appreciation for the input and support he had received in preparing the second report, as well as for the written submissions received on the topic from several Governments. The Special Rapporteur noted that certain additional aspects of the topic would be considered in more detail in his third report next year and, in this regard, indicated that he would continue to welcome views and input as the work on the topic progresses. In addition to the question of the interplay of the two elements, the Special Rapporteur requested views on the role of the practice of non-State actors, the role of resolutions of international organizations and conferences, the role of (and relationship with) treaties, the task of evaluating evidence of practice and acceptance of law, and ways of addressing the challenges of assessing the practice of States and evidence thereof.

148. The Special Rapporteur also indicated that the issues of "special" or "regional" customary international law, including "bilateral custom", which had been raised in the Sixth Committee in 2013, would be covered in his third report in 2015.

### 2. Summary of the debate

#### (a) General comments

149. There was broad support for the overall direction and approach of the Special Rapporteur. The two-element approach was universally welcomed. It was widely agreed that the outcome of the work should be a practical tool, of particular value to practitioners who are not specialists in international law. In this regard, it was recommended that the draft conclusions should be clear and should reflect the necessary nuance and qualification. There was also general agreement that the draft conclusions should not be unduly prescriptive and should reflect the inherent flexibility of customary international law.

150. Questions were raised, however, regarding the scope of the topic. Some members of the Commission called for more direct reference to the process of formation of rules of customary international law, in addition to consideration of the evidence of customary international law. A number of members also raised concerns about omitting a detailed examination of the relationship between customary international law and other sources of international law, in particular general principles of law. It was also proposed that consideration of the relationship with usages and comity would be useful.

151. The efforts of the Special Rapporteur to draw upon practice from different parts of the world were praised, though several members highlighted the difficulty of ascertaining the practice of States in this field. In light of the fundamental importance of making practice more accessible and available, it was deemed useful to again ask States to submit information on their practice relating to the identification of international law, as well as information on digests and other publications containing relevant State practice. Despite the difficulty of ascertaining State practice, some members cautioned against exclusive reliance on the jurisprudence of the International Court of Justice, as compared to other, more specialized, international courts and tribunals.

152. There was also an exchange of views on the related issue of who has the burden to prove the existence of a rule of customary international law. Some members of the Commission discussed the question whether, in a dispute on the existence of a certain rule, the burden of providing evidence is on the party claiming or denying the rule, and whether a judge should take affirmative steps to ascertain evidence.

153. The future programme of work proposed by the Special Rapporteur was generally supported. Several members welcomed the proposal to examine the interplay between the two elements of customary international law, with several members calling for particular consideration of the temporal aspects of the interaction. Further consideration of the role of international organizations, as well as regional and bilateral custom and the notion of a "persistent objector", was also welcomed. Some members expressed reservations, however, about the ambitious pace of work proposed by the Special Rapporteur, noting that the topic contained numerous difficult questions that would require cautious and careful consideration.

### (b) Use of terms

154. Views were exchanged on the desirability of including definitions of "customary international law" and "international organizations" as proposed in the draft conclusion on use of terms. Several members doubted whether the definitions were necessary or appropriate, while several other members considered the definitions to be useful and proposed that other terms, including the two elements of customary international law, could also be defined.

155. Regarding the definition of customary international law proposed by the Special Rapporteur in draft conclusion 2, there was extensive debate on two points. There were different opinions on whether to base the definition on the wording of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, and on whether to use the expression "*opinio juris*". Several members supported grounding the definition in the language of the Statute, though some members noted that this definition had been widely criticized in writings. Noting that "*opinio juris*" was the most common expression used in the jurisprudence and in writings, several members called for replacing the term "accepted as law" with "*opinio juris*", and several other members suggested including references to both terms. Various members of the Commission were of the view that the subjective element of custom ("*opinio juris*") is not synonymous with "consent" or the desire of States, but rather means the belief that a given practice is followed because a right is being exercised or an obligation is being complied with in accordance with international law.

### (c) Basic approach

156. There was widespread agreement on the basic, two-element approach to the identification of rules of customary international law. In particular, the view that the basic approach does not vary across fields of international law was supported by most members of the Commission. Some members indicated, however, that there appeared to be different approaches to identification in different fields, but acknowledged that the variation may be a difference in the application of the two-element approach, rather than a distinct approach.

157. In anticipation of the Special Rapporteur's consideration of the interplay between the two elements in his next report, several members commented on the temporal aspects of the two-element approach. There was concern that the approach as articulated in draft conclusion 3 seemed to imply that "a general practice" must always precede "acceptance as law". Several members indicated that it was the existence of both elements that was critical, rather than any temporal order.

158. With respect to assessing evidence of a general practice accepted as law, there were different views regarding the proposed language "regard must be had to the context, including the surrounding circumstances" in draft conclusion 4. Some members welcomed the mention of context as it indicated that the process was inherently flexible, whereas other members called for more clear and discrete criteria. A question was also raised about whether the proposed approach to identification reflected the realities of international practice. It was pointed out that an exhaustive review of State practice and *opinio juris* was exceptional, as more often than not evidence of a rule is first sought in the decisions of the International Court of Justice, the work of the International Law Commission, or in resolutions of the General Assembly and treaties.

### (d) "A general practice"

159. There were a range of views on the language in draft conclusion 5, which, in its pertinent part, proposed that "… a general practice means that it is primarily the practice of States that contributes to the creation … of rules of customary international law." It has been suggested that the language could be clarified to indicate precisely whose practice is relevant to determining the existence of "a general practice", though the proposed clarification varied. Some members of the Commission were of the view that the use of the word "primarily" was misguided as it suggested that the practice of entities other than the State could be relevant. Those members were of the view that the practice of international organizations was not to be taken into account in the process of identification of rules of customary international law. Other members considered that the practice of international organizations was only pertinent to the extent it reflected the practice of States. Some other members, however, agreed with the Special Rapporteur that the practice of international organizations as such could be relevant to the establishment of customary rules, particularly in regards to certain fields of activity within the mandates of those organizations. Those members drew attention to areas such as privileges and immunities, the responsibility of international organizations and the depositary function for treaties, in which the practice of international organizations is of particular relevance.

160. Members supported the proposal of the Special Rapporteur to further address in the third report the role of international organizations in relation to the identification of rules of customary international law. Insofar as international organization practice could be relevant, some members called for consideration of precisely what forms such practice could take. Some members also considered that the study of the role, if any, of the practice of non-State actors would be worthwhile.

161. On the issue of attribution of conduct, several members suggested to revise the proposed language of draft conclusion 6, which relied heavily upon the articles on

responsibility of States for internationally wrongful acts. According to those members, attribution should be conceived of differently in this context as, for purposes of customary international law, pertinent practice must be authorized by the State. Where an organ acted *ultra vires* it was questioned whether such conduct should be considered State practice. The question of whether or not conduct of non-State actors acting on behalf of the State constituted relevant practice was also raised in this regard.

162. There was broad support for the proposed forms of State conduct that may constitute "a general practice". In particular, several members welcomed that verbal acts were included along with physical acts, though some members called for clarification as to which verbal acts were relevant. There was uncertainty as to whether verbal acts, by themselves, could give rise to "a general practice", as well as whether or not verbal acts must be transcribed or repeated. It was recommended that the draft conclusions should specifically address other forms of verbal acts, such as the diplomatic acts of recognition and protest. It was also suggested that administrative acts be explicitly mentioned. Lastly, discussion took place as to the relevance of pleadings before international courts and tribunals as State practice.

163. As to the inclusion of "inaction" as a form of practice, there was a general view that the issue needed to be further explored and clarified. Several members considered that the precise conditions by which inaction becomes of interest should be examined, indicating that silence or inaction may only be relevant when the circumstances call for some reaction. The view was also expressed that inaction or silence may be of varying significance depending on whether the inaction relates to a restrictive rule or a practice of others in which the State does not itself engage.

164. With regard to weighing evidence of practice, questions were raised as to the precise meaning of the phrase in draft conclusion 8 "[t]here is no predetermined hierarchy among the various forms of practice". Several members indicated that the practice of certain organs of a State was more important than others, with some members noting that different organs were more or less empowered to reflect the international position of the State. It was suggested that, in evaluating the practice of an organ, it should be considered whether its mandate related directly to the content of the rule in question, as well as whether it acted on behalf of the State at the international level. The view was also expressed that the practice of national courts should be treated cautiously in this regard.

165. On the related matter of whether inconsistency in practice within a State should lessen the weight accorded to that State's practice, some members considered that such inconsistency was material, while several other members were of the view that conflicting practice amongst or by low-level organs should not affect the evidentiary value of a State's practice as a whole. Concern was also raised that the proposed language on such internal inconsistency in draft conclusion 8 was too prescriptive and would hinder the flexibility of the identification process.

166. It was also suggested that other criteria should be considered in determining whether manifestations of practice are valid for purposes of identifying rules of customary international law. For example, the view was expressed that valid practice should be public, comply with national law and have a certain linkage with the content of the rule in question.

167. The view that practice must be general and consistent to establish a rule of customary international law was generally supported, though several members raised concerns regarding particular terms used in proposed draft conclusion 9. The words "representative" and "sufficiently widespread", according to some members, required further elaboration and clarification. A number of members were also of the view that the term "uniform" or "virtually uniform" should be introduced into the conclusion, as well as the frequency or repetition of practice. Lastly, it was suggested that further elaboration may

be required on when deviant practice is to be set aside as an irrelevant violation of an existing rule, or as an exception in the process of formation.

168. The concept of "specially affected States", as reflected in draft conclusion 9, paragraph 4, was the subject of considerable debate. Several members were of the view that the concept was irreconcilable with the sovereign equality of States and should not be included in the draft conclusions. They stated that all States are interested in the content and scope, in the formation and development, of general international law in all fields, and as such the practice of all States, either by action or inaction, is equally relevant. Attention was drawn to the limited jurisprudence of the International Court of Justice on the subject, with some members noting that the Court had not made the concept one of general application and had only found that the practice of specially affected States should be examined in the specific context of a particular case. Other members not opposed to including the concept in the draft conclusions stressed that it was not a means to accord greater weight to powerful states, or to determine whether practice was sufficiently widespread. Ultimately, it was suggested that the role, if any, of specially affected States should be clarified, including any role the concept may have in the context of regional or bilateral rules.

### (e) "Accepted as law" ("*opinio juris*")

169. There was general agreement among the members of the Commission regarding the role of "acceptance as law" in determining the existence of a rule of customary international law. Some members were, however, concerned that the reference to a "sense of legal obligation" did not sufficiently clarify the operation of the subjective element. It was suggested that the role of deviant practice where a State seeks to alter an existing rule should be addressed in this regard.

170. With respect to evidence of acceptance of law, the notion that an act (including inaction) may establish both practice and acceptance as law was discussed. Certain members were of the view that, as a general matter, acceptance of a practice as compelled by law could not be proven by mere reference to the evidence of the practice itself. On the other hand, several members saw no problem with so-called "double-counting", noting that evidence of the two elements can be identified on the basis of an examination of the same conduct. It was proposed that this issue could be explored further in the examination of the interplay between the two elements.

171. Several additional comments were made on the evidence of acceptance as law. According to some members, but not other members, such acceptance needed to be nearly universal to establish a rule. Other members proposed that the role of resolutions of international organizations as potential evidence of *opinio juris* should be explored. There were also calls for clarification on certain points. For example, it was considered that elaboration was needed on the methods used to identify *opinio juris*, in addition to the forms of evidence provided in draft conclusion 11. Given the practical purpose of the work, further clarification on how to distinguish between practice that revealed acceptance as law and other conduct would be useful. Finally, it was proposed that the role of assessments of the subjective element by the International Committee of the Red Cross, as well as professional organizations and jurists, required some attention.

## 3. Concluding remarks of the Special Rapporteur

172. The Special Rapporteur observed that there continued to be widespread support among members of the Commission for the "two-element approach", noting that the temporal aspects of the two elements, as well as the relationship between them, merited further consideration. He also noted the general agreement within the Commission that decisions of international courts and tribunals were among the primary materials for

seeking guidance on the topic. As to the outcome of the topic, the members of the Commission continued to share the view that the work on the topic should result in the adoption of a practical guide to assist practitioners in the task of identifying customary international law, which would strike a balance between guidance and flexibility. There was still uncertainty, in the mind of the Special Rapporteur, as to the need to cover expressly the aspect of formation of rules of customary international law.

173. The Special Rapporteur indicated that this practical guide should take the form of a concise set of robust and comprehensive draft conclusions that should be read together with the commentaries thereto. The commentaries, which would form an indispensable supplement to the draft conclusions, should be relatively short, referring only to the key practice, cases and literature, like the articles on responsibility of States for internationally wrongful acts or on the responsibility of international organizations.

174. The importance of submissions by States on their practice in relation to customary international law, as well as information on national digests and related publications, was again emphasized, and the Special Rapporteur indicated the usefulness for the Commission of addressing a request to States in this regard.

175. With respect to the general issue of whose practice counted, the Special Rapporteur acknowledged that it could be more clearly stated that the draft conclusions refer first and foremost to State practice. On the other hand, he stressed that practice of at least certain international organizations in certain fields, such as in relation to treaties, privileges and immunities, or the internal law of international organizations, could not be dismissed.

176. As regards the terminology used in draft conclusion 1, the Special Rapporteur acknowledged that the word "methodology" had raised difficulties, but he pointed out that those difficulties were not necessarily overcome by the other proposals that were made during the debate. He stressed that the language of this conclusion should indicate that its purpose was to make clear that the draft conclusions were not seeking to identify the substantive rules of customary international law, but rather the approach to the identification of such rules. The Special Rapporteur also reiterated his doubts about the necessity to keep the proposed definitions in a draft conclusion 2, rather than in the commentary.

177. The Special Rapporteur underlined the fundamental importance of the basic approach set out in draft conclusion 3, and his preference for maintaining the wording of the Statute of the International Court of Justice. He indicated that this language was probably more relevant than other common expressions, since it left room for practice other than State practice and a wide notion of the subjective element. Nevertheless, in light of the controversies over the expression "accepted as law", the Special Rapporteur suggested to supplement it by the common term "*opinio juris*". He also pointed out that the general view was that there were not different approaches to identification in different fields of international law, though acknowledging that the basic approach may still be applied differently in relation to different types of rules.

178. As regards the use of the word "primarily" in draft conclusion 5, the Special Rapporteur clarified that this term was used in order to highlight the prominent role of the practice of States, while leaving room for the consideration of the practice of international organizations.

179. The Special Rapporteur recognized the need to study further whether rules on attribution adopted for the purpose of States responsibility were applicable in the present context. He also indicated a need to reflect further on the questions relating to the lawfulness of a practice.

180. The wide support enjoyed by draft conclusion 7, paragraphs 1 and 2, was welcomed, in particular concerning the inclusion of both verbal and physical acts. The Special Rapporteur acknowledged, however, that the questions on inaction raised by paragraphs 3 and 4 needed to be addressed in his next report.

181. Regarding the question of a possible hierarchy between forms of practice and conflicting practice within a single State, the Special Rapporteur made it clear that the emphasis was on the absence of a "predetermined" hierarchy and that he was certainly not suggesting that the actions of low-level organs would have the same weight as the practice of higher organs.

182. The Special Rapporteur welcomed the broad support for draft conclusion 9, though he acknowledged the debate that had arisen in regards to the reference to "specially affected States". He explained that the language of the paragraph was careful and that his intention was not to suggest that the practice of certain powerful States should be regarded as essential for the formation of rules of customary international law. The States in question may vary from rule to rule, and the expression does not refer to any particular States.

183. Regarding the two draft conclusions on "accepted as law", the Special Rapporteur recognized that their drafting should be better aligned with the language of the draft conclusions on "a general practice". He also indicated that the issue of the so-called "double-counting" of the same act as evidence of practice and *opinio juris* was to be addressed further, since different views had been expressed among the members of the Commission.

184. As to the future work programme for the topic, the Special Rapporteur indicated that the third report would address, in particular, the various aspects pertaining to international organizations, the relationship between customary international law and treaties, as well as resolutions of international organizations. The third report would also cover the questions of the "persistent objector", and regional, local and bilateral custom. The need to further consider the question of evidence, and the related matter of the burden of proof, was also stressed by the Special Rapporteur.

185. The Special Rapporteur acknowledged that his plan to submit a final report in 2016, with revised draft conclusions and commentaries, might be ambitious, but reassured the members of the Commission that he would not push things forward at the expense of quality. He also suggested that, to the extent draft conclusions were provisionally adopted by the Drafting Committee at the present session, they would be presented for information to the Plenary at this stage, and formally considered by the Plenary in 2015.

# Chapter XI
# Protection of the environment in relation to armed conflicts

## A. Introduction

186. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and decided to appoint Ms. Marie G. Jacobsson as Special Rapporteur for the topic.[831]

## B. Consideration of the topic at the present session

187. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/674 and Corr.1), which it considered at its 3227th to 3331st meetings, from 18 to 25 July 2014.

### 1. Introduction by the Special Rapporteur of the preliminary report

188. The preliminary report provided an introductory overview of phase I of the topic, namely the environmental rules and principles applicable to a potential armed conflict ("peacetime obligations"). It did not directly address measures to be taken during an armed conflict or post-conflict (phases II and III, respectively). In framing the report, the Special Rapporteur took into account the views expressed during the informal consultations held in the Commission in 2013, the views expressed by States in the Sixth Committee of the General Assembly, as well as the written submissions of States in response to the request by the Commission in its 2013 report.

189. The Special Rapporteur indicated that the report examined some aspects relating to scope and methodology, before proceeding to identify existing obligations and principles arising under international environmental law that could guide peacetime measures taken to reduce negative environmental effects in armed conflict. The Special Rapporteur considered that it was premature to attempt to evaluate the extent to which any peacetime obligations continued to apply during or after armed conflict. The report noted that certain obligations, such as the precautionary principle and the obligation to undertake environmental impact assessments, had comparable obligations under international humanitarian law, but such rules were far from identical to peacetime obligations. Detailed examination of phase II obligations would be undertaken in the next report.

190. The report also addressed the use of certain terms, as well as the relevance of international human rights law to this topic. The Special Rapporteur noted that draft definitions of the terms "armed conflict" and "environment" were proposed to facilitate discussion, though it was not envisioned that they would be referred to the drafting committee at the present session.

191. The Special Rapporteur concluded by describing the proposed future programme of work, noting that the envisaged time frame for the work was three years. The report next year on the law applicable during both international and non-international armed conflicts will contain an analysis of existing rules of armed conflict relevant to the topic, as well as

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[831] The decision was made at the 3171st meeting of the Commission, on 28 May 2013. *Official Records of the General Assembly, Sixty-eighth Session Supplement No. 10* (A/68/10), para. 167. For the syllabus of the topic, see *ibid., Sixty-sixth Session Supplement 10* (A/66/10), annex E.

their relationship to peacetime obligations. That report will also contain proposals for guidelines, conclusions or recommendations on, *inter alia*, general principles, preventive measures and examples of rules of international law that are candidates for continued application during armed conflict. The subsequent report, in 2016, will focus on post-conflict measures and will also likely contain a limited number of guidelines, conclusions or recommendations on, *inter alia*, cooperation, sharing of information and best practices, as well as reparative measures. The Special Rapporteur indicated that submissions of States highlighting relevant national legislation, as well her continued consultations with other international and regional entities, would continue to be of assistance.

### 2. Summary of the debate

#### (a) General comments

192. There was broad recognition of the importance of the topic and its overall purpose. Members generally agreed that the focus of the work should be to clarify the rules and principles of international environmental law applicable in relation to armed conflicts. Several members agreed with the Special Rapporteur that the Commission should not modify the law of armed conflict. On the other hand, some members were of the view that, in light of the minimal treatment of the environment in the law of armed conflict, further elaboration of environmental obligations in armed conflict might be warranted. It was suggested that the legal entity to be protected under this topic was the environment itself, and that the work on the topic should attempt to systematize the norms applicable in all three phases. It was also stressed that the Commission should not address basic questions relating to international environmental law or international human rights law as part of the topic.

#### (b) Scope and methodology

193. There was general support for the temporal, three-phased approach adopted by the Special Rapporteur, with some members indicating that the approach would facilitate the work. It was suggested that the temporal distinction would enable the Commission to focus on preparation and prevention measures in phase I and reparation and reconstruction measures in phase III. Some other members, however, raised concerns regarding an overly strict adherence to the temporal approach, noting that the Special Rapporteur herself had made clear in her Report that it is not possible to have a strict differentiation between the phases. To begin with, several members noted that it was unclear how the temporal phases would be reflected in a coherent final outcome. In developing guidelines or conclusions, several members were of the view that it would be difficult and inadvisable to maintain a strict differentiation between the phases, as many relevant rules were applicable during all three phases.

194. Some members suggested that a thematic approach to the work, rather than a strictly temporal approach, could be useful. It was recommended that consideration of the topic could proceed by examining (a) whether there are principles and rules of general international law or of international environmental law applicable to the protection of the environment in the context of armed conflict; (b) which rules or principles, if any, are adaptable to the protection of the environment in relation to armed conflict; and (c) what are the legal consequences of harm caused by grave attacks on the environment in an armed conflict.

195. The weight that should be accorded to phase II, namely obligations relating to the protection of the environment during an armed conflict, was the subject of considerable debate. Several members were of the view that phase II should be the core of the project as consideration of the other two phases was inherently linked to obligations arising during

armed conflict. According to those members, the law of armed conflict relevant to the protection of the environment was limited and did not reflect the present-day realities of armed conflict and the risk it poses for the environment. Several other members stressed that, as proposed by the Special Rapporteur, the Commission should not focus its work on phase II, as the law of armed conflict was *lex specialis* and contained rules relating to the protection of the environment.

196. There was also substantial discussion of limitations on the scope. Some members were of the view that the issue of weapons should be excluded from the topic, as proposed by the Special Rapporteur, while some other members argued that a comprehensive treatment of the topic would necessarily include consideration of weapons. Several members were of the view that general classes or types of weapons could be addressed, as necessary. It was suggested that it could be clarified that the work on the topic was without prejudice to existing rules on specific weapons.

197. Several members agreed that issues relating to internally displaced persons and refugees should be approached cautiously. It was stressed that such issues should not be entirely ignored, particularly insofar as the human rights dimension is included in the work. According to another view, it was questionable whether such issues were of direct relevance to the topic. Some members also agreed with the proposal to exclude consideration of cultural heritage, though several other members were of the view that the issue had important linkages to the environment, and that there were defects and gaps in the existing law that should be addressed.

198. Concerning environmental pressure as a cause of armed conflict, some members agreed that it should be excluded, though according to another view the issue was of major importance and relevance and should not be ignored.

199. Finally, questions were raised about the proposal to consider non-international armed conflicts. While there was widespread agreement with the proposal to address such conflicts, some members indicated that the inclusion would necessitate study of whether non-State actors were bound by the law of armed conflict, or by obligations that were identified as arising under phases I and III.

### (c) Use of terms

200. There was broad support for the proposal to develop working definitions to guide the discussions. In that spirit, there was a general exchange of views on the possible definitions of "armed conflict" and "environment" presented in the report. Whether definitions would ultimately be included in the outcome of the work, however, remained an open question.

201. The main issue discussed relating to the definition of armed conflict was the proposal to include conflicts between "organized armed groups or between such groups within a State".[832] Several members expressed support for that proposal. Other members were of the view that the definition should require a minimum degree of intensity and organization among the parties to an armed conflict. It was recommended that the definition clarify that "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence", were not covered.[833] According to some other members, however, it would be

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[832] International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A72, *Prosecutor v. Duško Tadić a/k/a "Dule"*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

[833] See Rome Statute of the International Criminal Court, 17 July 1998 (United Nations, *Treaty Series*, vol. 2187, No. 38544), art. 8, para. 2 (f); Protocol Additional to the Geneva Conventions of 12 August

too restrictive to require that armed conflicts may only occur between armed groups that show a minimum level of organization. Questions were also raised as to the legal consequences of damage to the environment in a conflict between non-State actors.

202. To develop a working definition on the "environment", it was proposed that the Commission would first need to determine whether the environment has a legal nature. Some members recalled that definitions of the term included in the report, for example the definition adopted by the Commission in the Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, were not internationally-accepted definitions. Several members were of the view that the working definition should thus be tailored to the particular purpose of the work, namely protection of the environment in armed conflict.

203. There was also a request for clarification on the use of the terms "principle" and "concept" in the report. It was suggested that if a "principle" was indeed a legal rule, that should be stated, as the term "concept" does not suggest a legal rule but rather a policy-oriented proposition.

### (d) Sources and other material to be consulted

204. The information provided in the report relating to State practice, international organization practice and the previous work of the Commission was welcomed. Several members indicated that further information and submissions from States would be critical to the work on the topic. In particular, it was suggested that the practice of States that had recently been involved or affected by armed conflict would be of particular value. In agreement with the Special Rapporteur, a number of members noted that the practice of the States included in the report, though interesting and useful, may not be generally representative of State practice worldwide. It was posited that, although other States might have a policy to protect the environment where possible, it was doubtful that the military forces of many other States were governed in armed conflict by national environmental laws, among other reasons because there were numerous exemptions available on national security grounds.

205. A general appeal was also made for additional information on the practice of international and regional organizations in this area, particularly with respect to peacekeeping operations and the protection of civilians. In a similar vein, it was considered that the best practices of international entities operating in this area, such as the International Committee for the Red Cross, would be useful. The ongoing consultations of the Special Rapporteur with such entities were thus well received.

### (e) Environmental principles and obligations

206. The information in the report on environmental principles was welcomed, though the general position of members was that further analysis of the particular relationship of such principles with armed conflict was required. Some members stressed that the Commission should not, as part of the topic, endeavour to decide whether "sustainable development" or the "principle of prevention" were general principles or rules of international law. Instead, the widespread view was that the topic should focus squarely on the applicability of such principles in relation to armed conflict.

207. Some members were of the view that further study of international environmental treaties should be undertaken. As most of those treaties were silent with respect to their

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1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, No. 17513), art. 1 (2).

applicability in relation to armed conflict, and as some treaties indicated expressly that they would not apply in armed conflict, further examination of the operation of environmental principles in the context of armed conflict was required. Some members also recalled in this regard that the Articles on the Effect of Armed Conflict on Treaties adopted by the Commission did not presume the continued application of environmental treaties, but instead concluded that certain treaties were not *ipso facto* suspended or terminated during armed conflict. It was also recalled that article 10 of those Articles provided that the termination or suspension of a treaty does not affect obligations embodied in the treaty that also apply independently of the treaty.

208. In addition to the general debate on the need to identify those peacetime obligations relevant to armed conflict, there was discussion of the specific environmental principles presented by the report. Some members requested further clarification on the content and operation of the precautionary principle in relation to armed conflict. According to another view, insofar as there was a precautionary principle under general international law, its operation in the context of armed conflict involved the duty of decision-makers to take care to spare civilian objectives and to employ means and methods of warfare with due regard to the protection and preservation of the natural environment. It was the position of some members that the law of armed conflict was *lex specialis* and, as a result, the obligations relating to precaution were those arising under that law.

209. The relevance to armed conflict of certain other principles identified in the report was questioned. Several members were not persuaded that sustainable development was of relevance to the topic. Similar doubts were expressed as to the "polluter-pays" principle and the obligation to conduct environmental impact assessments. Nevertheless, some members were in favour of further consideration of environmental impact assessments. Support was expressed for developing guidelines that would obligate States to prepare environmental impact assessments as part of military planning, and it was noted that the International Court of Justice had found that such assessments were required under general international law for industrial activities in a transboundary context.[834]

### (f) Human rights and indigenous rights

210. Different views were expressed on the consideration of human rights as part of the topic. Some members were of the view that international human rights law was of limited usefulness to the topic as it was of a sufficiently different character than international environmental law. Several other members recommended that human rights continue to form part of the work. In particular, those members drew attention to regional human rights jurisprudence that had identified human rights applicable in times of armed conflict, as well as jurisprudence on the collective right to a generally satisfactory environment included in the African Charter on Human and Peoples' Rights, 1981.[835] It was suggested that it would be helpful to engage in a substantive analysis of precisely which human rights are linked to the environment and which of those apply in relation to armed conflict.

211. There were also divergent views on the advisability of according indigenous rights separate treatment as part of the topic. While some members had reservations, several members supported the idea, indicating that indigenous peoples enjoyed a special relationship with the environment.

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[834] See *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 204.

[835] United Nations, *Treaty Series*, vol. 1520, No. 26363, art. 24.

### (g) Future programme of work

212. There was broad support for the proposal by the Special Rapporteur that her second report would further examine aspects of phase I, as well as address phase II, including analysis of the extent to which particular environmental principles are applicable in relation to armed conflict.

213. As far as the outcome of the work, several members expressed support for the development of practical, non-binding guidelines, though completion of the work by 2016 might prove difficult. Other members were of the view that further discussion was required on what the outcome of the work should be.

### 3. Concluding remarks of the Special Rapporteur

214. The Special Rapporteur recalled that the purpose of her preliminary report was to seek views on peacetime obligations, particularly environmental and human rights law obligations, before proceeding to the second report and the development of guidelines, conclusions or recommendations on both phases I and II.

215. With regard to scope and methodology, members had expressed a certain level of flexibility concerning the scope of the work, though there had also been considerable discussion of the proposed limitations on the scope. As several members did not want to exclude general issues concerning weapons, the Special Rapporteur reiterated that the effect of specific weapons should not be addressed as a separate issue since the law of armed conflict deals with all weapons on the same legal basis. She welcomed the possibility of a without prejudice clause.

216. The divergence of views on the treatment of cultural heritage was also noted. The Special Rapporteur recalled that there existed an intricate relationship between the environment and cultural heritage, in particular in relation to aesthetic or characteristic aspects of the landscape. She also recalled that there was a gap in the protection of cultural property and cultural heritage in relation to armed conflict that may need to be addressed. Because of the complexity of such issues, a more detailed analysis of the relevant issues would be presented in the second report.

217. A clear majority of members had expressed their support for the temporal, three-phase approach. Though some members had suggested a thematic approach, the Special Rapporteur recalled that the United Nations Environmental Programme, whose 2009 report dealt specifically with this topic,[836] had used a thematic approach. It turned out to be a complicated working method for the purpose of the present topic and would make drafting operative guidelines particularly difficult.

218. The Special Rapporteur clarified that her insistence that the Commission not revise existing law of armed conflict treaties should not be interpreted as an intention to neglect phase II. She recalled that the second report will address protection of the environment during armed conflict, including those law of armed conflict rules that may serve the purpose of protecting the environment during armed conflict, as well as those rules that may create obligations before an armed conflict.

219. There was a useful debate on the terms "armed conflict" and "environment", but there seemed to be a general understanding that there was no urgent need to address questions relating to the use of terms.

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[836] United Nations Environmental Programme, "Protecting the Environment During Armed Conflict: An Inventory and Analysis", November 2009, http://www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf.

220. On the availability of evidence of State practice, the Special Rapporteur reaffirmed the need to ascertain whether States have legislation and regulations in force aimed at protecting the environment in relation to armed conflict. In that regard, the Special Rapporteur reiterated that it would be useful if the Commission could ask, once again, States to provide examples of when international environmental law, including regional and bilateral treaties, had continued to apply in times of international or non-international armed conflict.

221. The Special Rapporteur was in full agreement with those members who expressed that further examination of the linkages between environmental principles, human rights law and armed conflict was necessary. She also agreed with the view that sustainable development was of little relevance to the topic, though she recounted that, last year, some Members had urged that sustainable development be included. She also noted that there has long been a political connection between warfare and sustainable development, as reflected in Principle 24 of the Rio Declaration.[837] She also drew the Commission's attention to the extensive work by the United Nations Independent Expert on human rights and the environment.[838]

222. Concerning the outcome of the work, a concern had been raised about which actors would be covered by the guidelines, conclusions or recommendations. As had been stated in the debate, it was premature to address this issue in depth. The Special Rapporteur acknowledged, however, that the scope of protection and the actors to whom the work would be addressed would likely differ for each of the phases.

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[837] Declaration on Environment and Development (Rio Declaration), 1992, *International Legal Materials*, vol. 31 (1992), p. 874.

[838] http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEenvironmentIndex.aspx.

# Chapter XII
# Provisional application of treaties

## A. Introduction

223. At its sixty-fourth session (2012), the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur for the topic.[839] At the same session, the Commission took note of an oral report, presented by the Special Rapporteur, on the informal consultations held on the topic under his chairmanship. The Commission also decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention"). The General Assembly subsequently, in resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work.

224. At its sixty-fifth session (2013), the Commission had before it the first report of the Special Rapporteur (A/CN.4/664) which sought to establish, in general terms, the principal legal issues that arose in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The Commission also had before it a memorandum by the Secretariat (A/CN.4/658), which traced the negotiating history of article 25 of the Vienna Convention both in the Commission and at the Vienna Conference of 1968–69, and included a brief analysis of some of the substantive issues raised during its consideration.

## B. Consideration of the topic at the present session

225. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/675) which sought to provide a substantive analysis of the legal effects of the provisional application of treaties.

226. The Commission considered the second report at its 3231st to 3234th meetings, from 25 to 31 July 2014.

227. At the 3243rd meeting, held on 8 August 2014, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the *travaux préparatoires* of the relevant provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986.

### 1. Introduction by the Special Rapporteur of the second report

228. In introducing his second report, the Special Rapporteur provided an overview of the consideration of the topic thus far. He indicated that, in response to a request addressed to

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[839] At its 3132nd meeting, on 22 May 2012, (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 267). The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in Annex C to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10)).

States to provide information on their practice, he had received submissions from ten States. He was of the view, however, that it was still premature to draw any conclusions on the practice of States on the basis of the submissions received, and requested that the Commission reiterate its request to States.

229. The Special Rapporteur indicated that the purpose of the second report was to provide a substantive analysis of the legal effects of the provisional application of treaties. He noted that while there was no intention to undertake an exhaustive analysis of the domestic constitutional law of States, an analysis of the legal effects of provisional application of treaties invariably took place in the light of domestic practice, given that States, in explaining their practice, tended to do so in terms of their domestic practice.

230. The question of the legal effects of provisional application of treaties was at the heart of his second report and was central to the Commission's approach to the provisional application of treaties. No analysis would provide real practical value for the understanding of the provisional application of treaties without a consideration of the legal consequences of the provisional application of treaties in relation to the other parties to the treaty and third States. He noted that the comments received from States, both in the Sixth Committee and in writing, had pointed to the fact that provisional application of treaties did have legal effects, both internationally and domestically. He also recalled that there had been cases before international tribunals in which the dispute had related precisely to the legal scope of the provisional application of a treaty.

231. He observed that the source of the legal obligations in question could be traced either to a clause in the treaty itself or arose from a separate agreement adopted in parallel to the main treaty. Since the decision to provisionally apply a treaty could manifest itself expressly or tacitly, the legal nature of the obligations, as well as the scope of the legal effects thereof, would depend on what was stipulated in the treaty. In his report, the Special Rapporteur identified four ways in which article 25, paragraph 1, of the Vienna Convention on the Law of Treaties might be manifested: (1) when a treaty established that it would apply provisionally from the moment of its adoption; (2) when the treaty established that it would be applied provisionally by the signatory States; (3) when the treaty left open the possibility for each State to decide if it wished to provisionally apply the treaty or not from the moment of the adoption of the treaty; and (4) when the treaty was silent on its provisional application and States applied article 25, paragraph 1. In other words, the obligations under the provisional application of treaties could take a contractual form or the form of one or more unilateral acts. As such, the legal analysis of the effect of unilateral acts was also of relevance to a study on the origin of obligations arising from the provisional application of treaties.

232. The Special Rapporteur further stated that the rights established by the provisional application of treaties as actionable rights would also depend on how the provisional application had been enshrined in the treaty or agreed to. Hence, the scope of the rights would be clearer in those cases where the treaty explicitly established that it would be provisionally applied from the moment of adoption or that of signature. In such cases, the contractual parties were known, and the States would know what the specific scope of their enforceable rights were in relation to the other States parties. The Special Rapporteur noted that such arrangement was common in the case of the provisional application of bilateral treaties.

233. The analysis of the scope of obligations became more complex when a State decided unilaterally to apply a treaty provisionally. In principle, the scope of the obligations arising from the provisional application could not exceed those established in the treaty. In the case of a unilateral declaration, the State in question would not be able to alter or amend the scope and content of what was covered by the provisional application of the treaty. It was important to bear in mind the distinction between domestic law obligations arising from the

provisional application of treaties as opposed to those generated under provisional application of treaties internationally. Such a distinction was also relevant when coming to the enforceability of rights by third States.

234. The Special Rapporteur further maintained that the regime that applied to the termination of treaties applied *mutatis mutandis* to the provisional application of treaties. He noted that some States followed the practice of performing the obligations agreed upon during a transitional period over which the provisional application of a treaty is being phased out, in the same manner as the case of the termination of the treaty itself, and that this was evidence that those States assigned the same legal effects to the termination of the provisional application of treaties as those for the termination of the treaty itself.

235. As for the legal consequences of breach of a treaty being applied provisionally, the Special Rapporteur limited himself to reiterating the applicability of the existing regime of the responsibility of States, as provided for in the 2001 articles on the responsibility of States for internationally wrongful acts.[840]

### 2. Summary of the debate

236. During the debate on the second report, broad agreement was expressed with the Special Rapporteur's view that the provisional application of a treaty, although juridically distinct from entry into force of the treaty, did nonetheless produce legal effects and was capable of giving rise to legal obligations, and that those were the same as if the treaty were itself in force for that State; a conclusion that was supported both in the case-law and by State practice. The view was expressed, however, that it had not been clarified whether the provisional application of treaties had legal effects that went beyond the provisions of article 18 of the Vienna Convention. According to another view, strictly speaking, the legal effect arose less from the act of applying a treaty provisionally, and more from the underlying agreement between States as reflected in the clauses in the treaty permitting its provisional application.

237. Several additional general observations were made concerning the legal consequences of the provisional application of treaties. The view was expressed that the provisional application of a treaty could not result in the modification of the content of the treaty, nor could States (or international organizations) which had not participated in the negotiation of the treaty resort to its provisional application, and the provisional application of a treaty could not give rise to a distinct legal regime separate from the treaty. Nor could provisional application give rise to rights for the State beyond those that were accepted by States and provided for in the treaty.

238. Some members expressed support for the Special Rapporteur's decision not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. Others were of the view that such an analysis, as part of a broader study on State practice, was both feasible and necessary for a proper consideration of the topic since the possibility of the resort to the provisional application of a treaty depended also on the internal legal position of the State in question. It was observed that a State's resort to a clause permitting provisional application was not only a matter of international law, but was also to be determined in the light of the applicable domestic law. It was also noted that any study of State practice had to include the legislative, constitutional and any other relevant practice of States. On the other hand, the view was expressed that while the provisional application of a treaty could have effects in the domestic legal system, that was

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[840] General Assembly resolution 56/83 of 12 December 2001, Annex.

not relevant for the Commission's consideration of the present topic. In terms of a further suggestion, the practice of the depositaries of treaties could be studied.

239. Different views were expressed concerning the Special Rapporteur's characterization of the decision to provisionally apply a treaty as a unilateral act. It was noted that such a view could not be reconciled with article 25 of the 1969 Vienna Convention, which specifically envisaged provisional application being undertaken on the basis of agreement between States and as an exercise of the free will of States. The source of the obligation that arose following a declaration to provisionally apply a treaty was the treaty itself, not the declaration, and the provisional application of a treaty involved a treaty-based relationship, in which the conduct of the State was not unilateral. It was also stated that it was possible for a State to unilaterally declare its intention to provisionally apply a treaty (reference was made to the possible example of the Syrian Arab Republic's purported provisional application of the Convention on the Prohibition of Chemical Weapons).[841]

240. Support was expressed for the applicability by analogy of article 70 of the 1969 Vienna Convention, dealing with the termination of treaties, to the termination of provisional application. Other members noted that while there was some overlap in the legal position of the termination of treaties and that of provisional application, this did not mean that the same rules applied, even *mutatis mutandis*. Nor, under this view, were the provisions on termination in the underlying treaty relevant to termination of its provisional application. In terms of a further view, if it were ascertained that article 70 did apply then it would have to be clarified whether this meant that the rules and procedures for the termination of treaties, existing at the domestic level, would apply equally to the termination of their provisional application. A difference of opinion was also expressed as to the applicability of the rules on the unilateral acts of States[842] to the termination of provisional application, as well as to the assertion that such termination could not be undertaken arbitrarily. The view was expressed that the possibility of unilateral termination of provisional application should, in principle, be limited so as to ensure the stability of treaties, and that following the termination of provisional application the principle of *pacta sunt servanda* would continue to apply. Other members were of the view that article 25, paragraph 2, envisaged termination occurring at will (subject to the requirement of giving notice).

241. As regards the consequences arising from a breach of an obligation in a treaty being provisionally applied, support was expressed for the applicability of the rules on responsibility for internationally wrongful acts, which, it was noted, was envisaged in article 73 of the 1969 Vienna Convention. It was also noted that article 12 of the 2001 articles referred to an obligation "regardless of its origin or character", which could cover obligations emanating from treaties being provisionally applied. In terms of another view, the matter required further reflection particularly as some adaptation of the rules on the responsibility of States might be called for in the case of a treaty being provisionally applied.

242. Suggestions for further consideration included: whether provisional application extended to the entire treaty, or whether it was possible to only provisionally apply parts

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[841] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, of 3 September 1992, United Nations, *Treaty Series*, vol. 1974, No. 33757, p. 45.

[842] See Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 176.

thereof, or indeed whether it was only possible to provisionally apply parts; analyzing further the relationship between the provisional application of treaties and their entry into force; analyzing the modalities for the termination of provisional application; considering whether the rules of customary international law on the provisional application of treaties were the same as those in the Vienna Convention; as well as studying the applicability of the regime on the reservations to treaties. It was also suggested that the Special Rapporteur proceed to consider the different consequences arising from the provisional application of bilateral as opposed to multilateral treaties. Support was also expressed for the Special Rapporteur's intention to deal with the provisional application of treaties by international organizations.

243. While support was expressed for the Special Rapporteur's intention to propose draft guidelines or conclusions, in terms of another view the Commission should not rule out the possibility of developing draft articles, as it had done in its work on the effects of armed conflicts on treaties.

### 3. Concluding remarks of the Special Rapporteur

244. In summarizing the debate on the second report, the Special Rapporteur observed, *inter alia*, that there had been general agreement that the basic premise underlying the topic was that, subject to the specificities of the treaty in question, the rights and obligations of a State which had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State. As a consequence of this, there was agreement in the Commission that, in principle, a breach of an obligation which arose out of the provisional application of a treaty constituted an internationally wrongful act, thereby triggering the rules on the responsibility of states for internationally wrongful acts.

245. He recalled that the various manifestations of provisional application identified in his report were merely illustrative, and did not exclude the possibility of other examples. He had presented the types more commonly found in practice as a means to attempt a greater systematization of the rules applicable to the provisional application of treaties, which had not been done during the negotiation of what became article 25 of the 1969 Vienna Convention. He had also taken note of the various suggestions made for how to undertake the work on the topic, including adopting a more inductive approach and considering not only State practice, but also jurisprudence and academic opinions.

246. The Special Rapporteur confirmed that he had likewise taken note of the concerns expressed regarding the reference in his analysis to the applicability of the rules on the unilateral acts of States. He clarified that he had intended to highlight the fact that it was typically left to the negotiating or contracting State to unilaterally decide whether to provisionally apply a treaty or not. As such, the legal obligation for the State arose not when the treaty, containing a clause allowing for provisional application, was concluded, but at the point in time at which the State unilaterally decided to resort to such provisional application. He clarified that he had, on purpose, not referred to the unilateral declaration in question as being the "source" of the legal obligations, but rather its "origin" in a temporal sense, i.e. the act which triggered the provisional application.

247. The Special Rapporteur observed further that he had taken note of the suggestions for specific issues to be considered in his future reports, such as the possibility of contracting States acquiescing to the provisional application by a third State even when a treaty did not expressly provide for provisional application, as well as undertaking a study of the practice of treaty depositaries. While he noted that there had been different views in the Commission as to the necessity of undertaking a comparative study of domestic legislation, he also recalled the suggestion that there be a consideration of the applicability of articles 27 and 46, paragraph 1, of the 1969 Vienna Convention. He indicated that this would be done as part of a broader study of all articles in the 1969 Vienna Convention

which might be of relevance to the provisional application of treaties (and not limited to the termination of treaties).

248. The Special Rapporteur further indicated his intention to complete, in his next report, the analysis of the contributions made by States on their practice. He also intended to consider the legal regime applicable to treaties between States and international organizations, and those between international organizations, and indicated that he would propose draft guidelines or conclusions for the consideration of the Commission at its next session.

# Chapter XIII
# The Most-Favoured-Nation clause

## A. Introduction

249. The Commission, at its sixtieth session (2008), decided to include the topic "The Most-Favoured-Nation clause" in its programme of work and to establish, at its sixty-first session, a Study Group on the topic.[843]

250. The Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),[844] and was reconstituted at the sixty-second (2010) and sixty-third (2011) sessions, under the same co-chairmanship.[845] At the sixty-fourth (2012) and sixty-fifth (2013) sessions, the Commission reconstituted the Study Group, under the chairmanship of Mr. Donald M. McRae.[846] In the absence of Mr. McRae during the 2013 session, Mr. Mathias Forteau served as chairman.

## B. Consideration of the topic at the present session

251. At the present session, the Commission, at its 3218th meeting on 8 July, reconstituted the Study Group on The Most-Favoured-Nation clause, under the chairmanship of Mr. Donald M. McRae. In his absence, Mr. Mathias Forteau served as chairman.

252. The Study Group held three meetings on 9, 10 and 18 July 2014.

253. At its 3231st meeting, on 25 July 2014, the Commission took note of the oral report on the work of the Study Group.

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[843] At its 2997th meeting, on 8 August 2008 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 354). For the syllabus of the topic, see *ibid.*, annex B. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[844] At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report of the Co-Chairmen of the Study Group on The Most-Favoured-Nation clause (*ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 211–216). The Study Group considered, *inter alia*, a framework that would serve as a road map for future work and agreed on a work schedule involving the preparation of papers intended to shed additional light on questions concerning, in particular, the scope of MFN clauses and their interpretation and application.

[845] At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the Co-Chairmen of the Study Group (*ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 359–373). The Study Group considered and reviewed the various papers prepared on the basis of the 2009 framework to serve as a road map of future work, and agreed upon a programme of work for 2010. At its 3119th meeting, on 8 August 2011, the Commission took note of the oral report of the Co-Chairmen of the Study Group (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 349–363). The Study Group considered and reviewed additional papers prepared on the basis of the 2009 framework.

[846] At its 3151st meeting, on 27 July 2012, the Commission took note of the oral report of the Chairman of the Study Group (*ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 245–265). The Study Group considered and reviewed additional papers prepared on the basis of the 2009 framework. At its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Study Group *ibid.*, (*Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 154–164). The Study Group continued to consider and review additional papers. It also examined contemporary practice and jurisprudence relevant to the interpretation of MFN clauses.

## 1. Draft final report

254. The Study Group had before it a draft final report on its overall work prepared by Mr. Donald M. McRae. The draft final report, which is in the form of an informal working document of the Study Group, is based on the working papers and other informal documents that had been considered by the Study Group in the course of its work since it began deliberations in 2009.[847]

255. The draft final report is divided in three parts. Part I provides the background, including the origins and purpose of the work of the Study Group, the Commission's prior work on the 1978 Draft articles on the Most-favoured-nation clause, and developments subsequent to the completion of the 1978 draft articles, in particular in the area of investment. The general orientation of the Study Group is not to seek a revision of those draft articles.

256. The draft report also addresses, in Part II, the contemporary relevance of and issues concerning MFN clauses, including in the context of the GATT and the WTO, other trade agreements, and investment treaties. It highlights the interpretative issues that have arisen in relation to the MFN clauses in BITs, against the background analysis of the treatment of MFN provisions in other bodies, such as the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD).

257. Part II then surveys the different approaches in the case-law to the interpretation of MFN provisions in investment agreements, addressing in particular: (a) the entitlement to the benefit of an MFN provision; (b) what constitutes treatment that is "no less favourable"; and (c) the question of the scope of the treatment to be provided under an MFN provision, focusing on the *Maffezini* case, its limitations and the post-*Maffezini* interpretation of MFN clauses. In this context, the draft report seeks to identify certain factors that have appeared to influence investment tribunals in interpreting MFN clauses and to identify trends.

258. Part III analyzes: (a) policy considerations in investment relating to the interpretation of investment agreements; (b) implications of investment dispute settlement arbitration as "mixed arbitration"; (c) the contemporary relevance of the 1978 draft articles to the interpretation of MFN provisions; and (d) the interpretation of MFN clauses, including addressing the factors relevant in the interpretative process in determining

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[847] The Study Group considered working papers on the following: (a) Review of the 1978 Draft Articles of the MFN Clause (Mr. Shinya Murase); (b) MFN in the GATT and the WTO (Mr. D.M. McRae); (c) The Most-Favoured-Nation Clause and the *Maffezini case* (Mr. A.R. Perera); (d) The Work of OECD on MFN (Mr. M.D. Hmoud); (e) The Work of UNCTAD on MFN (Mr. S.C. Vasciannie); (f) The Interpretation and application of MFN clauses in investment agreements (Mr. D.M. McRae); (g) The Interpretation of MFN Clauses by Investment Tribunals (Mr. D.M. McRae). (this working paper was a restructured version of the working paper, "Interpretation and Application of MFN Clauses in Investment Agreements"); (h) The Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions (Mr. M. Forteau); (i) A BIT on Mixed Tribunals: Legal Character of Investment Dispute Settlements (Mr. S. Murase); and (j) Survey of MFN language and Maffezini-related Jurisprudence (Mr.M.D. Hmoud). The Study Group also had before it: (a) A *Catalogue of MFN provisions* (prepared Mr. D.M. McRae and Mr. A.R. Perera); (b) An informal document, in tabular form, identifying the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision that was being interpreted; (c) An informal working paper on Model MFN clauses post-*Maffezini*, examining the various ways in which States have reacted to the *Maffezini* case; (d) An informal working paper providing an overview of MFN-type language in Headquarters Agreements conferring on representatives of States to the organization the same privileges and immunities granted to diplomats in the host State; (e) An informal working paper on "Bilateral Taxation Treaties and the Most-Favoured-Nation Clause".

whether an MFN provision in a BIT applies to the conditions for invoking dispute settlement. This part also examines the various ways in which States have reacted in their treaty practice to the *Maffezini* case, including by: specifically stating that the MFN clause does not apply to dispute resolution provisions; specifically stating that the MFN clause does apply to dispute resolution provisions; or specifically enumerating the fields to which the MFN clause applies.

### 2. Discussions of the Study Group

259. The Study Group undertook a substantive and technical review of the draft final report with a view to preparing a new draft for next year to be agreed on by the Study Group. The Study Group expressed its appreciation for the substantial work done by Mr. McRae in putting together the various strands of issues concerning the topic into one comprehensive draft report. The Study Group noted that the draft final report systematically analyses the various issues discussed by the Study Group since its inception, which considered the MFN clause within the broader framework of general international law, and in the light of developments since the adoption of the 1978 Draft articles.

260. The Study Group acknowledged the need, as prefaced by the author, to make attempts to shorten the report and to update certain elements of the draft report in the light of more recent cases.[848]

261. The Study Group once more underlined the importance and relevance of the Vienna Convention of the Law of Treaties, as a point of departure, in the interpretation of investment treaties. Accordingly, there was emphasis placed on analyzing and contextualizing the case-law and drawing attention to the issues that had arisen and trends in the practice. It also stressed the significance of taking into account the prior work of the Commission on Fragmentation of international law: difficulties arising from the diversification and expansion of international law, and its current work on Subsequent agreements and subsequent practice in relation to interpretation of treaties. It also highlighted the need to prepare an outcome that would be of practical utility to those involved in the investment field and to policy makers.

262. Finally, the Study Group acknowledged as feasible the timeline of seeking to present a revised draft final report for consideration at the sixty-seventh session of the Commission in 2015, taking into account comments made and amendments proposed by individual members of the Study Group during the present session.

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[848] See e.g. including in particular *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1 dispatched to the parties on 22 August 2012; *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26 dispatched to the parties on 19 December 2012; *Teinver S.A. v. Argentina*, ICSID Case No. ARB/09/1 dispatched to the parties on 21 December 2012; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 dispatched to the parties on 2 July 2013; and *Garanti Koza LLP v. Turkmenistan* of 3 July 2013.

# Chapter XIV
# Other decisions and conclusions of the Commission

## A. Programme, procedures and working methods of the Commission and its documentation

263. At its 3199th meeting, on 6 May 2014, the Commission established a Planning Group for the current session.[849]

264. The Planning Group held three meetings. It had before it: Section I of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session entitled "Other decisions and conclusions of the Commission"; General Assembly resolution 68/112 of 16 December 2013 on the Report of the International Law Commission on the work of its sixty-fifth session; and General Assembly resolution 68/116 of 16 December 2013 on the rule of law at the national and international levels, as well as the proposed Strategic Framework for the period 2016–2017 (A/69/6), covering "Programme 6: Legal Affairs".

265. The Commission took note of the proposed Strategic Framework for the period 2016–2017 (A/69/6), covering "Programme 6: Legal Affairs, subprogramme 3, "Progressive development and codification of international law".

### 1. Inclusion of a new topic on the programme of work of the Commission

266. At its 3227th meeting, on 18 July 2014, the Commission decided to include the topic "Crimes against humanity" in its programme of work and to appoint Mr. Sean D. Murphy as Special Rapporteur.

### 2. Working Group on the Long-term Programme of Work

267. At its 1st meeting, on 7 May 2014, the Planning Group decided to reconstitute for the current session the Working Group on the Long-term Programme of Work. In the absence of its chairman Mr. Donald M. McRae, the Working Group was chaired by Mr. Mahmoud D. Hmoud and Mr. Marcelo Vázquez-Bermúdez. Mr. Vázquez-Bermúdez submitted an oral report to the Planning Group, at its 3rd meeting, on 28 July 2014.

268. The Working Group recommended the inclusion in the long-term programme of work of the Commission of the topic, "*Jus cogens*", on the basis of the proposal prepared by Mr. Dire D. Tladi.

269. The Working Group was guided by the recommendation of the Commission at its fiftieth session (1998) regarding the criteria for the selection of the topics:

(a) The topic should reflect the needs of the States in respect of the progressive development and codification of international law;

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[849] The Planning Group was composed of: Mr. S. Murase; Mr. L. Caflisch, Mr. P. Comissário Afonso, Mr. A. El-Murtadi Suleiman Gouider, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. K. Gab Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. P. Šturma, Mr. E. Valencia-Ospina, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood; and Mr. D.D. Tladi (*ex officio*).

(b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;

(c) The topic is concrete and feasible for progressive development.

The Commission also agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[850]

270. The Commission endorsed the recommendation for the inclusion of the topic in the long-term programme of work. The syllabus of the topic included by the Commission in its long-term programme of work at the present session is annexed to the present report.

271. The Working Group on the Long-term Programme of Work also considered its methods of work. It identified the need to conduct a systematic review of the work of the Commission and a survey of possible future topics for its consideration. It recalled in particular that since undertaking a systematic review of its work and developing an illustrative general scheme of topics in 1996,[851] no similar exercise had been carried out in the ensuing years. Accordingly, the Working Group agreed to review and update the list of possible topics, using the 1996 list as a starting point for that purpose. To this end, the Working Group decided to recommend that the Commission request the Secretariat to review the 1996 list in the light of subsequent developments and prepare a list of potential topics for the Commission, accompanied by brief explanatory notes ("survey"), by the end of the present quinquennium. The Working Group also decided to recommend that extensive syllabuses on the list of topics prepared by the Secretariat be developed only once the Working Group establishes a final list of topics, possibly in 2016. In the meanwhile, the Working Group would continue to consider any topics that members may propose.

272. The Commission endorsed the recommendation and consequently requests the Secretariat to review the 1996 list in the light of subsequent developments and prepare a list of potential topics ("survey"), accompanied by brief explanatory notes, by the end of the present quinquennium.

### 3. Consideration of General Assembly resolution 68/116 of 16 December 2013 on the rule of law at the national and international levels

273. The General Assembly, in resolution 68/116 of 16 December 2013 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. Since its sixtieth session (2008), the Commission has commented annually on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report (A/63/10) remain relevant and reiterates the comments in paragraph 231 of its 2009 report (A/64/10), paragraphs 390 to 393 of its 2010 report (A/65/10), paragraphs 392 to 398 of its 2011 report (A/66/10), paragraphs 274 to 279 of its 2012 report (A/67/10) and paragraphs 171 to 179 of its 2013 report (A/68/10).

274. The Commission recalls that the rule of law constitutes the essence of the Commission. The Commission's object, as set out in Article 1 of its Statute, is the promotion of the progressive development of international law and its codification.

275. Having in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level, and aims at promoting respect for the rule of law at the international level.

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[850] *Yearbook … 1998*, vol. II (Part Two), p. 10, para. 553.

[851] *Yearbook … 1996*, vol. II (Part Two), Annex II.

276. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission will continue to take into account, where appropriate, the rule of law as a principle of governance and the human rights that are fundamental to the rule of law as reflected in the preamble and in Article 13 of the Charter of the United Nations and in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels.[852]

277. In its current work, the Commission, is aware of "the interrelationship between the rule of law and the three pillars of the United Nations (peace and security, development, and human rights)",[853] without emphasizing one at the expense of the other. In fulfilling its mandate concerning the progressive development and codification of international law, the Commission is conscious of current challenges for the rule of law.

278. In the course of the present session, the Commission has continued to make its contribution to the rule of law, including by the adoption of its final draft articles on the "Expulsion of aliens"; the adoption, on first reading, of a set of draft articles on the "Protection of persons in the event disasters"; and the adoption of the final report on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)".

279. The Commission has also continued its work on other topics which concern the rule of law, such as "The immunity of state officials from foreign criminal jurisdiction", "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", "The protection of the atmosphere", "The protection of the environment in relation to armed conflicts", "Identification of customary international law", "Provisional application of treaties", "The Most-Favoured-Nation clause", and has appointed a Special Rapporteur for the topic "Crimes against humanity".

280. The Commission reiterates its commitment to the rule of law in all of its activities.

### 4. Honoraria

281. The Commission reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which has been expressed in the previous reports of the Commission.[854] The Commission emphasizes that the above resolution especially affects Special Rapporteurs, as it compromises support for their research work.

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[852] Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1, 30 November 2012, para. 41.

[853] Report of the Secretary-General on Measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations, S/2013/341, 11 June 2013, para. 70.

[854] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 525–531; *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 447; *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 369; *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 501; *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 269; *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 379; *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 358; *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 240; *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 396, and *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 399; *ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 280; and *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 181.

### 5. Documentation and publications

282. The Commission reiterated its recognition of the particular relevance and significant value to its work of the legal publications prepared by the Secretariat.[855] It noted with appreciation that the Codification Division was able significantly to expedite the issuance of its publications through its highly successful desktop publishing initiative, which greatly enhanced the timeliness and relevance of these publications to the Commission's work for more than a decade. The Commission noted with regret the curtailment and possible discontinuation of this initiative due to a lack of resources and that consequently no new legal publications were distributed at its current session. The Commission was of the view that the continuation of this initiative was essential to ensure the timely issuance of these legal publications, in particular *The Work of the International Law Commission*. The Commission reiterated the particular relevance and significant value of the legal publications prepared by the Codification Division to its work, and reiterated its request that the Codification Division continue to provide it with those publications.

283. The Commission reiterated its expression of satisfaction that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, would not be subject to arbitrary length restrictions. The Commission noted with satisfaction that the experimental measures to streamline the processing of the Commission's summary records introduced at the previous session had resulted in the more expeditious transmission of the provisional records to members of the Commission for timely correction, and prompt release of the final texts. The Commission also welcomed the fact that the new working methods had led to the more rational use of resources and called on the Secretariat to continue its efforts to facilitate the preparation of the definitive records in all languages, without compromising their integrity.

284. The Commission expressed its gratitude to all services involved in the processing of documents, both in Geneva and in New York, for their timely and efficient processing of the Commission's documents, often under narrow time constraints, which contributed to the smooth conduct of the Commission's work.

285. The Commission expressed its appreciation to the United Nations Office at Geneva Library, which assisted members of the Commission very efficiently and competently.

### 6. Trust fund on the backlog relating to the *Yearbook of the International Law Commission*

286. The Commission reiterated that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work on the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolution 67/92, expressed its appreciation to governments that had made voluntary contributions to the Trust Fund on the backlog relating to the *Yearbook of the International Law Commission*, and encouraged further contributions to the Trust Fund.

### 7. Assistance of the Codification Division

287. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and its involvement in research projects on the work of the Commission.

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[855] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 387–395.

### 8. *Yearbook of the International Law Commission*

288. The Commission recommends that the General Assembly *express its satisfaction* with the remarkable progress achieved in the last few years in catching up with the backlog of the *Yearbook of the International Law Commission* in all six languages, and welcome the efforts made by the Division of Conference Management, especially its Editing Section of the United Nations Office at Geneva in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; *encourage* the Division of Conference Management to provide continuous necessary support to the Editing Section in advancing the production of the *Yearbook*; and *request* that updates on the progress in this respect be provided to the Commission on a regular basis.

### 9. Websites

289. The Commission renewed its expression of appreciation for the results of the activity of the Secretariat in its continuous updating and management of its website on the International Law Commission.[856] The Commission reiterated that the website and other websites maintained by the Codification Division[857] constitute an invaluable resource for the Commission and for researchers of the work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website on the work of the Commission included information on the current status of the topics on the agenda of the Commission, as well as advance edited versions of the summary records of the Commission. The Commission also expressed its gratitude to the Secretariat for the successful completion of the digitization and posting on the website of the entire collection of the Commission's documents in Spanish, together with the addition of a full-text search capability.

### 10. United Nations Audiovisual Library of International Law

290. The Commission noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law[858] in promoting a better knowledge of international law and the work of the United Nations in this field, including the International Law Commission.[859] The Commission expressed its deep concern about the

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[856] Located at http://www.un.org/law/ilc.

[857] Generally accessible through: http://www.un.org/law/lindex.htm.

[858] Located at http://www.un.org/law/avl/.

[859] See, e.g., in the Historic Archives: Statute of the International Law Commission, Introductory note by Michael Wood; Vienna Convention on Diplomatic Relations, 1961, Introductory note by Eileen Denza; Vienna Convention on Consular Relations, 1963, Introductory note by Juan Manuel Gómez Robledo; Vienna Convention on the Law of Treaties, 1969, Introductory note by Karl Zemanek; Vienna Convention on Succession of States in respect of Treaties, 1978, Introductory note by Anthony Aust; Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997, Introductory note by Stephen McCaffrey; Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Introductory note by James Crawford; Articles on Diplomatic Protection, 2006, Introductory note by John Dugard; Articles on the Responsibility of International Organizations, 2011, Introductory note by Giorgio Gaja. See also, for example, in the Lecture Series: State Immunity on the Occasion of the United Nations Convention on Jurisdictional Immunity of States and Their Property, Gerhard Hafner; The Work of the International Law Commission on the "Most-Favoured-Nation" Clause, Donald M. McRae; Protection of the Atmosphere and Codification and Progressive Development of International Law, Shinya Murase; Responsibility in international law – An introduction, Alain Pellet; International Liability for Transboundary Harm Arising from Hazardous Activities, Pemmaraju Sreenivasa Rao; Codification of the Law on Transboundary Aquifers (Groundwaters) by the United Nations, Chusei Yamada.

current financial situation which threatened the continuation and further development of this unique educational resource which benefitted all Member States and urged the General Assembly to address this situation.

## B. Date and place of the sixty-seventh session of the Commission

291. The Commission recommended that the sixty-seventh session of the Commission be held in Geneva from 4 May to 5 June and 6 July to 7 August 2015.

292. The Commission considered the possibility to hold a part of its future sessions in New York and will revert to this issue at its forthcoming sessions.

## C. Cooperation with other bodies

293. At the 3228th meeting, on 22 July 2014, Judge Peter Tomka, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.[860] An exchange of views followed.

294. The Asian-African Legal Consultative Organization (AALCO) was represented at the present session of the Commission by its Secretary-General, Mr. Rahmat Mohamad, who addressed the Commission at the 3218th meeting, on 8 July 2014.[861] He briefed the Commission on the current activities of AALCO and provided an overview of the deliberations of AALCO on four topics on the programme of work of the Commission, namely "Immunity of State officials from foreign criminal jurisdiction", "Protection of persons in the event of disasters"; "Identification of customary international law" and "Protection of the Atmosphere". An exchange of views followed.

295. The Inter-American Juridical Committee was represented at the present session of the Commission by Vice-President of the Inter-American Juridical Committee, Mr. Fabián Novak, who addressed the Commission at the 3223rd meeting, on 15 July 2014.[862] He gave an overview of the activities of the Committee in 2013 on various legal issues affecting the Americas. An exchange of views followed.

296. The Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe were represented at the present session of the Commission by the Chair of the Committee of Legal Advisers on Public International Law, Ms. Liesbeth Lijnzaad, and the Head of the Public International Law Division of the Council of Europe, Ms. Marta Requena, both of whom addressed the Commission at the 3224th meeting, on 16 July 2014.[863] They focused on the current work of CAHDI in the field of public international law, as well of the Council of Europe. An exchange of views followed.

297. The African Union Commission on International Law was represented at the present session of the Commission by African Union Commission on International Law, Ambassador Cheikh Tidiane Thiam, member of the African Union Commission on International Law, accompanied by Mr. Adewale Iyanda, Legal Officer at the Office of the Legal Counsel of the African Union Commission. He addressed the Commission at the

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[860] This statement is recorded in the summary record of that meeting.

[861] *Ibid.*

[862] *Ibid.*

[863] *Ibid.*

3230th meeting, on 24 July 2014.[864] He gave an overview of the activities of the African Union Commission on International Law. An exchange of views followed.

## D. Representation at the sixth-ninth session of the General Assembly

298. The Commission decided that it should be represented at the sixty-ninth session of the General Assembly by its Chairman, Mr. Kirill Gevorgian.

299. At its 3243rd meeting, on 8 August 2014, the Commission requested Mr. Eduardo Valencia-Ospina, Special Rapporteur on the topic "Protection of persons in the event of disasters", to attend the sixty-ninth session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35, subject to the availability of funds.

## E. International Law Seminar

300. Pursuant to General Assembly resolution 68/112, the fiftieth session of the International Law Seminar was held at the Palais des Nations from 7 to 25 July 2014, during the present session of the International Law Commission. The Seminar is intended for young jurists specializing in international law, including young professors or government officials pursuing an academic or diplomatic career in posts in the civil service of their country.

301. Twenty-four participants of different nationalities, from all regional groups took part in the session.[865] The participants attended plenary meetings of the Commission, specially arranged lectures, and participated in working groups on specific topics.

302. Mr. Kirill Gevorgian, Chairman of the Commission, opened the Seminar. Mr. Markus Schmidt, Senior Legal Adviser to the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar. The University of Geneva ensured the scientific coordination of the Seminar. Mr. Vittorio Mainetti, an international law expert from the University of Geneva, acted as coordinator, assisted by Ms. Yusra Suedi, legal assistant, and Mr. Morgan Crump, intern in the Legal Liaison Office of UNOG.

303. The following lectures were given by members of the Commission: Mr. Ernest Petrič: "*The Work of the International Law Commission*"; Ms. Marie Jacobsson: "*Protection of the Environment in relation to Armed Conflict*"; Mr. Sean D. Murphy: "*Crimes Against Humanity*"; Mr. Shinya Murase: "*Protection of the Atmosphere*"; Mr. Mahmoud D. Hmoud: "*Prevention of Terrorism*"; Mr. Eduardo Valencia-Ospina:

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[864] *Ibid.*

[865] The following persons participated in the Seminar: Mr. Sattar Azizi (Iran (Islamic Republic of)), Ms. Diana Cucos (Moldova), Mr. Tommaso Di Ruzza (Holy See), Mr. Christian Djeffal (Germany), Ms. Marie Françoise Fernandez (France), Mr. Harouna Garba Hamani (Niger), Ms. Daniela Gauci (Malta), Ms. Lusine Hakobyan (Armenia), Ms. Ritta Raundjua Hengari (Namibia), Mr. Ata Hindi (State of Palestine), Mr. Michael Khetlha Kabai (South Africa), Ms. Hermine Kembo Takam Gatsing (Cameroon), Mr. Piotr Kobielski (Poland), Mr. Senthil Kumar (India), Mr. Suzgo Lungu (Malawi), Mr. Pablo Andrés Moscoso De La Cuba (Peru), Mr. Luis Xavier Oña Garces (Ecuador), Mr. Mohamed Hassam Negm (Egypt), Mr. Alberto Manuel Poletti Adorno (Paraguay), Ms. Lucía Raffin (Argentina), Ms. Silvana Schimanski (Brazil), Ms. Ryoko Shinohara (Japan), Mr. Benjamin Santorlino Kuron Tombe (South Sudan), Mr. Fajar Yusuf (Indonesia). The Selection Committee, chaired by Ms. Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva, met on 3 April 2014 and selected 25 candidates out of 143 applications. One selected candidate could not attend the Seminar.

"*Protection of Persons in the Event of Disasters*"; Mr. Dire Tladi: "*Jus cogens*"; and Mr. Juan Manuel Gómez-Robledo: "*Provisional Application of Treaties*".

304. A lecture was also given by Mr. Jordi Agusti-Panareda, Senior Legal Officer at the International Labour Organization (ILO), on "*The Proliferation of Labour Provisions in FTAs and Their Interplay with the ILO Standards System*".

305. Seminar participants attended four external sessions. A workshop on "*Identification of Customary International Law*" was organized at the Graduate Institute of International and Development Studies, in the presence of Mr. Michael Wood, Special Rapporteur on the topic, and chaired by Prof. Andrea Bianchi (Graduate Institute of International and Development Studies). A special session on "*Immunity and International Crimes*" was held at the Geneva Academy of International Humanitarian Law and Human Rights, featuring Ms. Concepción Escobar Hernández, Special Rapporteur on Immunity of State officials from foreign criminal jurisdiction and chaired by Prof. Paola Gaeta (University of Geneva), with the participation of other members of the Commission. Seminar participants also attended a conference organised by the University of Geneva in collaboration with the journal *The Law and Practice of International Courts and Tribunals*, on the topic: "*The ILC and International Courts and Tribunals: A Fruitful Dialogue?*". The Conference was addressed by the following speakers: Mr. Eduardo Valencia-Ospina (member of the Commission and Editor-in-Chief of the Journal); Mr. Shinya Murase (member of the Commission); Prof. Attila Tanzi (University of Bologna, Italy); Prof. Pierre Bodeau-Livinec (University Paris 8 – Vincennes Saint-Denis, France); Mr. Mathias Forteau (member of the Commission); Mr. Dire Tladi (member of the Commission); Prof. Robert Kolb (University of Geneva); Mr. Michael Wood (member of the Commission); Prof. Makane Mbengue (University of Geneva); and Prof. Laurence Boisson de Chazournes (University of Geneva). Finally, a session was organised at the World Health Organization (WHO) focusing on International Health Law. Presentations were given by Mr. Gian Luca Burci, Legal Counsel of the WHO, Steven A. Solomon, Principal Legal Officer, and Mr. Jakob Quirin, Associate Legal Officer.

306. Two Seminar working groups on "*Protection of the Atmosphere*" and "*Immunity of State Officials from Foreign Criminal Jurisdiction*" were organized. Each Seminar participant was assigned to one of them. Two members of the Commission, Ms. Concepción Escobar Hernández and Mr. Shinya Murase, supervised and provided expert guidance to the working groups. Each group prepared a report and presented its findings during the last working session of the Seminar. The reports were compiled and distributed to all participants as well as to the members of the Commission.

307. The Republic and Canton of Geneva offered its traditional hospitality at the Geneva Town Hall where the Seminar participants visited the Alabama room and attended a cocktail reception.

308. Mr. Kirill Gevorgian, Chairman of the Commission, Mr. Markus Schmidt, Director of the International Law Seminar, and Mr. Michael Khetlha Kabai, on behalf of the Seminar participants, addressed the Commission during the closing ceremony of the Seminar. Each participant was presented with a certificate of attendance.

309. The Commission noted with particular appreciation that since 2011 the Governments of Argentina, Austria, China, Czech Republic, Finland, India, Ireland, Mexico, Sweden, Switzerland, and of the United Kingdom had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. Though the recent financial crisis affected contributions, the situation of the Fund still allowed granting a sufficient number of fellowships to deserving candidates especially from developing countries in order to achieve adequate geographical distribution of participants.

This year, 14 fellowships (6 for travel and living expenses, 7 for living expenses only and 1 for travel expenses only) were granted.

310. Since 1965, the year of the Seminar inception, 1139 participants, representing 171 nationalities, have taken part in the Seminar. 699 participants have received fellowships.

311. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations based in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2015 with as broad participation as possible.

## F. Commemoration of the 50th Anniversary of the International Law Seminar

312. The Commission held a meeting to commemorate the fiftieth anniversary of the Seminar on 22 July 2014. The meeting coincided with the visit to the Commission of Judge Peter Tomka, President of the International Court of Justice. The theme of the Session was "International Law as a Profession". The Chairman of the Commission, the President of the International Court of Justice,[866] members of the Commission who were once participants of the seminar,[867] a member of the Commission who was associated with the Seminar at its inception,[868] the Director of the Seminar[869] and representatives of participants to the 2013 and 2014[870] sessions of the International Law Seminar made statements.

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[866] Participant in 1982.

[867] Mr. E.J.A. Candioti (1970), Mr. S. Murase (1975), Mr. N. Singh (1980), Mr. C.M. Peter (1984) and Mr. P. Šturma (1989).

[868] Mr. E. Valencia-Ospina.

[869] Mr. Markus Schmidt, Senior Legal Adviser of the United Nations Office at Geneva.

[870] Ms. Carolina Abreu (2013) and Mr. Christian Djeffal (2014).

# Annex

## *Jus Cogens*
## (Mr. Dire D. Tladi)

## 1. Introduction

1. Over the years, the Commission has contributed a significant body of work on the sources of international law, particularly in the area of the law of treaties. The 1966 Draft Articles on the Law of Treaties, which resulted in the 1969 Vienna Convention on the Law of Treaties, is a prime example of the Commission's work on the sources of international law.[1] The current programme of work of the Commission includes source-related topics such as subsequent agreements and subsequent practice in relation to treaty interpretation, the identification of customary international law and provisional application of treaties. This focus on sources by the Commission is appropriate because sources are a traditional topic of international law and questions relating to the sources lie at the heart of international law.[2]

2. Against this background, it is proposed that the Commission study another source-related topic, "*Jus cogens*". The title of the study should be broad in order to allow the Commission to address all relevant aspects, on the understanding that the Commission would need to define carefully the scope and limits of the project at an early stage.

## 2. Previous Consideration of *Jus Cogens* by the Commission

3. Although the concept of *jus cogens* predates the Commission's existence,[3] the Commission has been very instrumental in the acceptance and development of *jus cogens*. In its 1966 Draft Articles on the Law of Treaties, the Commission included three draft articles on *jus cogens*, namely Draft Articles 50, 61 and 67. These provisions were retained, albeit with some amendments, in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties (hereinafter referred to as the "Vienna Convention").[4] Notwithstanding its inclusion in the Vienna Convention, the contours and legal effects of *jus cogens* remain ill-defined and contentious. Indeed, while there are numerous cases invoking *jus cogens*, to date there remains little case-law involving invocation of *jus cogens* to impeach the validity of a treaty. Consequently, while the existence of *jus cogens* as part of the modern fabric of

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[*] Produced with the research assistance of the following interns: Chad Remus (from NYU, served as intern during 2013), Eric Brandon (from NYU, served as intern during 2014) and Duy-Lam Nguyên (from IHEID, served as intern during 2014). The assistance of Marija Đorđeska (SJD Candidate, George Washington) is also acknowledged.

[1] Other more recent products of the Commission on treaty law include the 2011 International Law Commission Guide to Practice on Reservations to Treaties and the 2011 International Law Commission Draft Articles on the Effects of Armed Conflicts on Treaties.

[2] See Annex A of the Report of the International Law Commission, Sixty Third Session (A/66/10) at para. 1.

[3] For a historical development of *jus cogens* see, Antonio Gómez Robledo *El Ius Cogens Internacional (Estudio Histórico crítico)* (1982), 10 to 68.

[4] *Jus cogens* was first included in the work of the Commission in the Third Report by GG Fitzmaurice, Special Rapporteur on the Law of Treaties (A/CN. 4/115), under the title "legality of the object". See 1958 *Yearbook of the International Law Commission Volume II: Documents of the Tenth Session including the Report of the Commission to the General Assembly*, 26–27.

international law is now largely uncontroversial,[5] its precise nature, what norms qualify as *jus cogens* and the consequences of *jus cogens* in international law remain unclear. It was in this context that former member of the Commission Andreas Jacovides presented a paper to a Working Group of the Planning Group on *jus cogens* as a possible ILC topic in 1993. In his paper, Mr Jacovides made the following observation, the essence of which remains true even today:

> In the nearly quarter of a century since the Convention was adopted, no authoritative standards have emerged to determine the exact legal content of *jus cogens*, or the process by which international legal norms may rise to peremptory status.[6]

4. Notwithstanding the arguments advanced by Mr Jacovides for the inclusion of the topic in the Commission's programme of work, the Commission decided not to do so. Mr Bowett, then chair of the Working Group considering the proposal, explaining why it was not appropriate to include the topic, expressed doubt as to whether consideration by the Commission of the topic of *jus cogens* would "serve any useful purpose *at this stage*". He concluded that because practice on *jus cogens* "did not yet exist" it would be "premature for [the Commission] to enter into this kind of study". This reasoning is comparable to the reasons advanced by the Commission in its commentary to Draft Article 50 of the 1966 Draft Articles on the Law of Treaties. In paragraph 3 of the commentary, the Commission stated as follows:

> The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in the process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals.

5. Two observations can be made about the Commission's previous decisions not to attempt detailed provisions on the full content and operation of *jus cogens*. First, both Mr Bowett's comments and the Commission's commentary to Draft Article 50 confirm that the Commission was of the view that there remained room for the further development of *jus cogens*.[7] Second, it is clear from both Mr Bowett's statement and the commentary that the Commission felt, on both occasions, that detailed provisions on *jus cogens* could be worked out only after more practice relating to it had developed. Taken together, the Commentary to Draft Article 50 and the statement by Mr Bowett suggest that the further elucidation of the rules relating to *jus cogens* would be possible, perhaps desirable, if sufficient practice on which to base the work of the Commission were available.

6. In the period since the 1966 Draft Articles and the 1993 proposal by Mr Jacovides practice has developed at a rapid pace. In particular, national and international courts have often referred to *jus cogens* and in this way provided insights on some of the intricacies of

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[5] Already in the 1966 Draft Articles, the Commission noted that the "view that there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain". See paragraph 1 of the Commentary to Draft Article 50 of the 1966 Draft Articles on the Law of Treaties.

[6] In a similar note, the International Law Commission's Study Group Report on Fragmentation: Difficulties Arising from the Diversification and Expansion of International Law of 13 April 2006 stated as follows: "disagreement about [*jus cogens*'] theoretical underpinnings, scope of application and content remains as ripe as ever" (at para. 363).

[7] In paragraph 3 of the Commentary to Draft Article 50, the Commission stated that, at that point, it was appropriate to provide for the rule in general terms "and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals".

its formation, operation, content and consequences or effects. [8] States have at times also referred to *jus cogens* in support of positions that they advance.[9] The Commission itself, in the course of considering other topics, has also made meaningful contributions to this development. Article 26 of the Draft Articles on State Responsibility, for example, provides that circumstances precluding wrongfulness provided in the Draft Articles may not be used to justify conduct that is inconsistent with *jus cogens*. The commentary thereto presents a non-exhaustive list of *jus cogens* norms.[10] In addition to repeating the list contained in the commentary to Draft Article 26, the Report of the Study Group on Fragmentation provides a list of "the most frequently cited candidates" for the status of *jus cogens*.[11] The Commission's Guide to Practice on Reservations to Treaties also provides detailed analysis on the effects of *jus cogens* on the permissibility and consequences of reservations.[12]

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[8] See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua. v. United States), ICJ Reports* 1986, 14; *Arrest Warrant of 11 April 2000 (DRC v Belgium) ICJ Reports* 2002, 3; *Armed Activities on the Territory of the Congo (New Application 2002: DRC v Rwanda), ICJ Reports* 2006, 99; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening), ICJ Reports* 2012, 99. See especially the dissenting opinion of Judge Trindade in the *Jurisdictional Immunities of the State case,* the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal and the dissenting opinions of Judges Oda, Al-Khasawneh and van den Wyngaert in the *Arrest Warrant case. Al-Adsani v UK* (Application no. 35763/97), 21 November 2001. See also the separate opinion of Judge *ad hoc* Lauterpacht in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports* 1993, 325 (Separate Opinion of Judge Lauterpacht), paras 100–104 and *Regina v. Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 24 March 1999, House of Lords, 119 ILR, p. 136.

[9] See for example, statement by Counsel to Belgium in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal),* Oral Proceedings, 13 March 2012 (CR 2012/3), para 3 and statement by Counsel to Senegal in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal),* Oral Proceedings, 15 March 2012 (CR 2012/4), para 39. See also Counter-Memorial of Senegal in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal),* para 51. Similarly, while Germany sought to limit the effects of *jus cogens* in the *Jurisdictional Immunities case,* its own statement not only did not dispute the existence of *jus cogens* but in fact positively asserted the character of certain norms as *jus cogens.* See, for example, the Memorial of the Federal Republic of Germany in the *Jurisdiction Immunities case,* 12 June 2009, para 86 where Germany states: "Undoubtedly, for instance, *jus cogens* prohibits genocide.". See also Statement of South Africa of 29 October 2009 on the report of the International Law Commission (A/C.6/64/SR.15, paras. 69–70) cited in the Second Report of the Special Rapporteur, Mr Roman Kolodkin on Immunity of State Officials from Foreign Criminal Jurisdiction, 10 June 2010 (A/CN.4/631), para 9, especially footnote 13. On 28 October 2013, during the Sixth Committee's consideration of the report of the International Law Commission, Portugal highlighted *jus cogens* as of "utmost importance". (A/C.6/68/SR.17), para 88.

[10] See paragraph 5 of the Commentary to Draft Article 26 in which the Commission, in fairly unequivocal terms, states that those "peremptory norms that are clearly accepted and recognised include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the aright to self-determination".

[11] See Paragraph 374 of Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 April 2006 (A/CN.4/L.682). See also Conclusion 33 of the Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006).

[12] See, e.g., Commentary to Draft Guide 3.1.5.4 and Guide 4.4.3 of the Guide to Practice on Reservations to Treaties. See also *Armed Activities on the Territory of the Congo (New Application 2002: DRC v. Rwanda)* (Separate Opinion of Judge Dugard) (discussing the effect of reservations that violate *jus cogens*), para. 9. See also Principle 8 of the Guiding Principles applicable to unilateral

## 3. Elements of *Jus Cogens* in Judicial Decisions

7. Although the Commission's work has advanced the understanding of *jus cogens*, the starting point for any study of *jus cogens* remains the Vienna Convention. From the Vienna Convention basic elements of the nature, requirements and consequences of *jus cogens* are spelt out. According to the Vienna Convention, *jus cogens* refers to peremptory norms of general international law defined as (1) norms (2) accepted and recognised by the international community of states as a whole (3) from which no derogation is permitted.[13] The consequence of a norm acquiring the status of *jus cogens* is that treaties conflicting with it are void.[14]

8. This formulation addresses some key issues which, prior to the Vienna Convention, may not have been clear. For example, the formulation addresses an important question concerning the nature of *jus cogens*. In its original conception, *jus cogens* was seen as a non-consensual source of law deriving from natural law.[15] While Article 50 of the 1966 Draft Articles may have left this question open by simply defining *jus cogens* as "a peremptory norm of general international law from which no derogation is permitted", Article 53 of the Vienna Convention adds the qualifier "accepted and recognised by the international community of States as a whole", thereby suggesting acceptance by states as a whole is a requirement for *jus cogens*.

9. What Article 53 of the Vienna Convention does not specify is the process by which a norm of general international law rises to the level of being peremptory, nor does it specify how such norms are to be identified. Questions that arise in this respect include the meaning and implications of "accepted and recognised by the international community of States as a whole". For example, the ILC Study Group asked: "If it is the point of *jus cogens* to limit what may be lawfully agreed by States – can its content simultaneously be made dependent on what is agreed between States?"[16] Furthermore, although the formulation addresses a basic issue of consequences for treaties, it leaves open several other issues relating to consequences, including consequences for other rules not contained in treaties.[17] This includes not only how norms of *jus cogens* interact with other rules of international law, for example Chapter VII resolutions of the UN Security Council, but also the consequences of a violation of a *jus cogens* norm.[18] The Commission's previous work, including the Articles on State Responsibility, could provide useful insights on some of these questions.[19] Article 26, for example, provides that the grounds excluding wrongfulness in the Articles, may not be used to justify an act that is inconsistent with an obligation arising under a peremptory norm.[20]

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declarations of States capable of creating legal obligations, with commentaries thereto, *Yearbook of the International Law Commission*, 2006, vol. II, Part Two.

[13] Article 53 of the Vienna Convention.

[14] Articles 53 and 64 of the Vienna Convention.

[15] See, e.g. Alfred Verdross "Forbidden Treaties in International Law: Comments on Professor Garner's Report on 'The Law of Treaties'" (1937) 31 *American Journal of International Law* 571.

[16] See Report of the Study Group on Fragmentation, 13 April 2006, para. 375.

[17] Id., para. 367.

[18] *Id.*

[19] See, e.g. Draft Article 26 of the Draft Articles on State Responsibilities and the commentary thereto in relation to the potential conflict between a secondary rule on state responsibility, in particular grounds precluding wrongfulness, and a peremptory norm of international law.

[20] See especially paragraphs 3 and 4 of the Commentary to Draft Article 26 on the Draft Articles on State Responsibility.

10. As mentioned earlier, *jus cogens* has been referred to in a number of judgments of both the Permanent Court of International Justice and the International Court of Justice as well as in dissenting and separate opinions of various judges.[21] In earlier cases, however, the Court had not sought to clarify the nature, requirements, content or consequences of *jus cogens* and had been content to simply refer to *jus cogens*. A typical example in this regard is the Court's observations on the prohibition on the use of force in the *Military and Paramilitary Activities case*.[22] The Court referred to the fact that the prohibition on the use of force is often referred to by states as being "a fundamental or cardinal principle of [customary international] law", that the Commission has referred to "the law of the Charter concerning the prohibition" as a "conspicuous example of a rule of international law having the character of *jus cogens*", and that both parties to the dispute referred to its *jus cogens* status.[23] The Court itself, however, did not state expressly that it viewed the prohibition on the use of force as constituting a norm of *jus cogens*.

11. In more recent cases, however, the Court has been more willing to characterise certain norms as *jus cogens* and to engage more with the intricacies of *jus cogens*. In *Questions Relating to the Obligation to Extradite or Prosecute*, for example, the Court states that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[24] Further, the Court indicated that the prohibition was "grounded in a widespread international practice and on the *opinio juris* of States," that it appeared "in numerous international instruments of universal application", that "it has

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[21] In the Report on the Fragmentation of International Law, the Study Group listed opinions of individual judges dealing with *jus cogens* which included the Oscar Chinn case, P.C.I.J. Series A/B, No. 63 (1934) (separate opinion of Judge Schücking) p. 149; *Application of the Convention of 1902 Governing the Guardianship of Infants (the Netherlands v. Sweden) ICJ Reports* 1958, 55 (separate opinion of Judge Moreno Quintana) pp. 106 *et seq.*; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) ICJ Reports* 1969, 3 (separate opinion of Judges Padilla Nervo and Sörensen) pp. 97 and 248; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) *ICJ Reports* 1969, 3 (dissenting opinion of Judge Tanaka), at p. 182; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) ICJ Reports* 1970,3 (separate opinion of Judge Ammoun), at p. 304; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports* 1986, 14 (separate opinion of President Nagendra Singh) p. 153; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports* 1986, 14 (separate opinion of Judge Sette-Camara) pp. 199 et seq; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro)) ICJ Reports* 1993, 325 (separate opinion of Judge *ad hoc* Lauterpacht) p. 440; *Legality of Use of Force (Yugoslavia v. United States of America) Request for the Indication of Provisional Measures*, *ICJ Reports* 1999, 916 (dissenting opinion of judge ad hoc Kreća) pp. 53-61, paras. 10–17; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Reports* 2002, 3 (dissenting opinion of Judge Al-Khasawneh) p. 95, para. 3; *Oil Platforms (Islamic Republic of Iran v. United States of America) ICJ Reports* 2003, 161 (separate opinion of Judge Buergenthal), para. 23. See also *The Arbitral Award in the Matter between the Government of Kuwait and American Independent Oil Company*, (1982) 21 *ILM* 976, para 90. *Azanian People's Organisation (AZAPO) v Truth and Reconciliation* 1996 (4) SA 562 (C), 574B.

[22] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua. v. United States)*, 1986 ICJ Reports 14 at para 190.

[23] *Id.*, para. 190.

[24] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, *ICJ Reports* 2012, para. 99.

been introduced into the domestic law of almost all States", and that "acts of torture are regularly denounced within national and international fora".[25]

12. In the *Jurisdictional Immunities of the State case*, the Court considered various aspects of *jus cogens*, including its relationship with sovereign immunity from jurisdiction. It held that, because rules of immunities and possible *jus cogens* norms of the law of armed conflict "address different matters", there was no conflict between them.[26] According to the Court, immunities are procedural in nature, regulating the exercise of national jurisdiction in respect of particular conduct, and not the lawfulness of the conduct being proscribed by *jus cogens*. There could, therefore, be no conflict between immunity and *jus cogens*.[27] The Court draws a firm distinction between the substantive prohibition on state conduct constituting *jus cogens* and the procedural immunity states enjoy from national jurisdiction, holding that they operate on different planes such that they cannot be in conflict even in cases where "a means by which a *jus cogens* rule might be enforced was rendered unavailable".[28] In addition to addressing the issue of the relationship between immunity and *jus cogens*, the Court's judgment also suggests that the prohibition of crimes against humanity constitutes *jus cogens*.[29] A similar view of the relationship between *jus cogens* and procedural rules is adopted by the Court in *Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, where the Court found that the fact that a matter related to a *jus cogens* norm, in that case the prohibition on genocide, "cannot of itself provide a basis for the jurisdiction of the Court to entertain the dispute".[30] The Court's reasoning in these cases could be interpreted as suggesting that international rules unrelated to the legality of the underlying conduct are not affected by the fact that the prohibition of that conduct is *jus cogens*. In any event, these recent cases address the issue of the relationship between *jus cogens* and other rules of international law in a way that could assist the Commission in systematising the rules of international law in this area.

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[25] Id.

[26] See paras 92, 95 and 97 of the *Jurisdictional Immunities of the State case.* See also para 64 in the *Armed Activities in the Congo case (New Application 2002: DRC v Rwanda)* concerning the consequences of *jus cogens* on jurisdiction and para 64 in the *Al-Adsani case*. See also *Jones & Others v. United Kingdom* (Applications nos. 34356/06 and 40528/06), E.C.H.R. para. 198 (Jan. 14, 2014) (finding that "by February 2012, no *jus cogens* exception to State immunity had yet crystallised").

[27] Para 93 of the *Jurisdiction Immunities of the State case.* For a contrary position see Judge Cançado Trindade's dissenting opinion in the *Jurisdictional Immunities case,* the joint separate of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant case,* the dissenting opinions of Judges Oda, Al-Khasawneh and Judge ad hoc van den Wyngaert in the *Arrest Warrant case.* With respect to national court decisions, in *Jurisdictional Immunities of the State* the Court cited to decisions in Canada, Greece, New Zealand, Poland, Slovenia, and the United Kingdom where sovereign immunity was acknowledged even in the face of allegations of *jus cogens* violations. *Jurisdictional Immunities of the State*, para. 96. For the United States, intermediate courts have rejected an implied exception to sovereign immunity where the foreign State was accused of violating *jus cogens* norms. See *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992); *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1997); and *Sampson v. Germany*, 250 F.3d 1145 (7th Cir. 2001). For immunity of officials, compare *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th Cir. 2004); *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012) (acknowledging immunity of foreign government officials despite allegations of *jus cogens* violations), with *Yousuf v. Samantar*, 699 F.3d 763, 776–77 (4th Cir. 2012) (denying immunity).

[28] Para. 95 of the *Jurisdiction Immunities of the State case.*

[29] *Id.* at 95 referring to its judgement in the *Arrest Warrant case.*

[30] *Armed Activities on the Territory of Congo case* at para. 64.

## 4. Legal Issues to be studied

13. The Commission could make a useful contribution to the progressive development and codification of international law by analysing the state of international law on *jus cogens* and providing an authoritative statement of the nature of *jus cogens*, the requirements for characterising a norm as *jus cogens* and the consequences or effects or *jus cogens*. The Commission could also provide an illustrative list of existing *jus cogens* norms. The consideration of the topic by the Commission could, therefore, focus on the following elements:

(a) the nature of *jus cogens*;

(b) requirements for the identification of a norm as *jus cogens*;

(c) an illustrative list of norms which have achieved the status of *jus cogens*;

(d) consequences or effects of *jus cogens*.

14. With respect to the nature of *jus cogens*, the Vienna Convention conceptualises *jus cogens* as a norm of positive law, founded on consent. This was also borne out by the judgments of the ICJ, including the *Belgium v. Senegal case* where, when justifying its conclusion that the prohibition against torture is a norm of *jus cogens*, the Court noted that the prohibition was grounded on "widespread international practice and on the *opinio juris* of States", noting further that it "appears in numerous international instruments of universal application" and that "it has been introduced into the domestic law of almost all States".[31] The Court also added that torture "is regularly denounced within national and international fora".[32] The conceptualisation of *jus cogens* in positive law terms, as based on acceptance of states, may be a departure from an earlier understanding rooted in natural law thinking.[33] The study of the nature of *jus cogens* could also permit the Commission to consider the type of norms that thus far have acquired the status of *jus cogens* in order to determine whether norms of *jus cogens* have common attributes. A study of the nature of *jus cogens* would also touch upon, for example, the relationship between *jus cogens* and customary international law as well as the distinction between *jus cogens* and other possibly related concepts such as non-derogable rights found in international human rights treaties and *erga omnes* obligations.[34]

15. The requirements for a norm to achieve the status of *jus cogens* are spelt out in Article 53 of the Vienna Convention. However, there is room for the Commission to provide elements that could be used to indicate that a norm, beyond being a norm of general international law, has achieved the status of *jus cogens*. A study of those cases in which courts or tribunals found the existence of *jus cogens* could assist the Commission in identifying the mode of formation as well as criteria for identifying norms of *jus cogens*.

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[31] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Judgment of 20 July 2012, *I.C.J. Reports 2012*, 422 at para 99.

[32] *Ibid.*

[33] See, e.g., Andrew Jacovides *International Law and Diplomacy: Selected Writings* (2011), 18. *Cf. Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Arbitral Award, 31 July 1989, Vol XX *UNRIAA*, 119, at para 44 (suggesting a jus cogens norm can develop as either custom or by the formation of a general principle of law). See also *Siderman de Blake v. Argentina*, 965 F.2d at 715 (arguing that jus cogens is derived from fundamental values of the international community, rather than the choice of states).

[34] For example, the commentary to Draft Article 50 of the Draft Articles on the Law of Treaties clarifies that "[n]or would it be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void" (para. 2).

The reasons advanced by the Court in *Belgium v. Senegal* for the proposition that torture qualifies as *jus cogens*, for example, could provide useful guidance in the search for specific requirements for the identification of *jus cogens*.[35] Statements by States, to the extent that they do more than suggest that this or that norm is a norm of *jus cogens*, could also assist the Commission in this exercise. A related matter concerns the process through which norms of *jus cogens* are replaced by subsequent norms of *jus cogens* as defined in article 53 of the Vienna Convention.

16. The proposal also entails producing an illustrative list of norms that currently qualify as *jus cogens*. Such a list would be based on an assessment of the judgments of the ICJ and other courts and tribunals as well as the previous work of the Commission, in particular the commentaries to Draft Article 50 of the 1966 Draft Articles, commentaries to Article 26 of the Articles on the Responsibility of States and commentaries to Guideline 3.1.5.4 of the Guide to Practice on Reservations. It would be important for any list produced by the Commission to specify clearly that it is not a closed list. There may well be fears that a list, even with most careful drafting, could lead to the conclusion that it is exclusive. While this is always possible, this concern should not be overstated. It only serves to emphasise that not only should the illustrative list be carefully drafted but also that the commentary should be sufficiently clear so as to avoid misunderstanding.

17. Finally, the study should also address the effects and consequences of *jus cogens*. This would include the legal effect of *jus cogens* on other rules of international law. While Articles 53 and 64 spell out consequences of *jus cogens* for the validity of treaties, the legal effects of *jus cogens* on other rules are not addressed. Recent decisions of the Court, in particular, *Jurisdictional Immunities of the State case* and *the Armed Activities in the Congo case* address the relationship between *jus cogens* and procedural and secondary rules of international law.[36] In addition to state and official immunity, international tribunals have addressed other possible consequences, such as immunity of international organizations, the relationship with Security Council resolutions, the effect of statutes of limitations, and the effect on extradition treaties.[37] Previous work of the Commission, in particular the commentary to Article 26 of the Articles on State Responsibility as well as Section E of the Report of the Study Group Fragmentation, also provide relevant insights for studying the effects of *jus cogens* on other rules of international law. The consideration of the effects and consequences of *jus cogens* is likely to be the most challenging part of the study and will require careful analysis of the jurisprudence of both international and domestic courts.

## 5. The Topic Meets the Requirement for Selection of New Topics

18. The topic meets the requirements for selection of new topics set by the Commission. These requirements are that new topics should reflect the needs of states in respect of codification and progressive development, should be significantly advanced in terms of

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[35] See para. 99 of *Obligation to Prosecute or Extradite*.

[36] See *Jurisdictional Immunities of the State* at 94 and *Armed Activities on the Territory of the Congo (New Application 2002: DRC v Rwanda)* at para 64. See also generally Erika de Wet "*Jus Cogens* and Obligations *Erga Omnes*" in Dinah Shelton (Ed) *The Oxford Handbook of International Human Rights Law* (2013).

[37] *Stichting Mothers of Srebrenica and Others v. Netherlands,* App no. 65542/12 (ECHR 2013) (holding that *jus cogens* does not trump immunity of international organizations). *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* at paras 100–104. *Prosecutor v. Furundzija* (Judgment) ICTY-95-17/1 (10 December 1998) at para 157 (mentioning lack of a statute of limitations and not allowing a political offence exemption in extradition treaties for *jus cogens* torture violations as two possible implications of *jus cogens* violations).

state practice to permit progressive development, and codification and should be concrete and feasible.

19. The topic is important for states by promoting greater clarity on *jus cogens*, its formation and effects. Several recent disputes between States have implicated *jus cogens* or potential *jus cogens* norms.[38] While States have often agreed that the specific norms in question qualified as *jus cogens*, the dispute has often related to the effect of the *jus cogens* norms on other rules of international law. Clarifying some of the legal aspects of *jus cogens* could facilitate the resolution of international disputes.[39] As with the topic on customary international law, clarifying the rules on *jus cogens* would be particularly useful for domestic judges and other lawyers not experts in international law who may be called upon to apply international law, including *jus cogens*. In particular, the study could provide useful guidelines for national courts on how to identify norms of *jus cogens* and how such norms interact with other rules of international law. As is evident from the recent practice described above, the topic is sufficiently advanced in terms of practice to permit codification and progressive development and is concrete and feasible.

## 6. Conclusion

20. That *jus cogens* forms part of the body of modern international law is not seriously in dispute. Nonetheless, the precise contours, content and effects of *jus cogens* remains in dispute. The Commission could make a meaningful contribution to the codification and progressive development of international law by addressing the elements identified.

21. The outcome of the work of the Commission on this topic can take any one of a number of forms. However, Draft Conclusions with commentaries appear, at this stage, the most appropriate form. The conclusions, while containing minimum normative content, would also have to be drafted in such a way as not to arrest the development of *jus cogens* or "cool down" its normative effect.

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[38] Examples, in this regard, include *Belgium v. Senegal, Jurisdictional Immunities of State* and the *Armed Activities in the Congo case.*

[39] During the consideration of the Commission's report during the 2013 session of the Sixth Committee of the General Assembly, several delegations expressed support for the consideration of the topic of *jus cogens*. Portugal for example, highlighted the topic as "of utmost importance". See Summary Records of the 17th Meeting of the Sixth Committee, 28 October 2013 (A/C.6/68/SR.17), para. 88. Similarly Iran expressed support for the consideration of the topic, See Summary Records of the 26th Meeting of the Sixth Committee, 5 November 2013 (A/C.6/68/SR.26), para. 4.

## Selected reading list

### A. ILC Documents

Draft Articles on the Law of Treaties, with commentaries, 1966, Vol II *Yearbook of the International Law Commission,* 38

Draft Articles on the Responsibility of States for Wrongful Acts, with commentaries, 2001, Vol II, Part Two, *Yearbook of the International Law Commission,* 31

Conclusions of the Work of the Study Group on Fragmentation of International Law: A Difficulties arising from the Diversification and Expansion of International Law (contained in GA Res A/61/10), 2006

Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (finalised by Martti Koskenniemi) 13 April 2006 (A/CN.4/L.682)

Guide to Practice on Reservation to Treaties, Report of the International Law Commission, Sixty-third session (contained in GA Res A/66/10), 2011

### B. Select cases

#### 1. International Court of Justice

*Armed Activities in the Territory of Congo (New Application 2002: DRC v. Rwanda), ICJ Reports* 2006, 6

*Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), ICJ Reports* 2002, 3

*Barcelona Traction, Light and Power Company Ltd (Second Phase), ICJ Reports* 1970, 3

*Jurisdictional of the State (Germany v. Italy: Greece Intervening), ICJ Reports* 2012, 99

*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits), ICJ Reports* 1986, 14

*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Reports* 2012, 422

#### 2. Other Courts and Tribunals

*Al-Adsani v. UK (Application No. 35763/97), 21 November 2001* (European Court of Human Rights)

*Aloeboetoe*, Judgment of 10 September 1993, (Ser. C) No. 15 (1993) (Inter-American Court of Human Rights)

*Arbitral Award in the Matter between the Government of Kuwait and American Independent Oil Company, (1982) 21 ILM 976*

*Azanian People's Organisation (AZAPO) v. Truth and Reconciliation 1996 (4) SA 562 (C)* (South Africa)

*Blake*, Merits, Judgment of 24 January 1998, (Ser. C) No. 36 (1998)

*Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Arbitral Award, 31 July 1989, Vol XX *UNRIAA*, 119

*Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012) (United States)

*Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (United States)

*Prosecutor v. Furundžija* (IT-95-17/1), 10 December 1998 (ICTY)

*Southern African Litigation Centre and Another v. National Director of Public Prosecutions and Others*, High Court of South Africa (Case 77150/09, unreported), judgment of 8 May 2012 (South Africa)

*Stichting Mothers of Srebrenica and Others v. Netherlands*, App No. 65542/12 (ECHR 2013)

*Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (United States)

*Yousuf v. Samantar*, 699 F.3d 763, 776–77 (4th Cir. 2012) (United States)

## C. Select bibliography

Bassiouni, C "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 *Law and Contemporary Problems* 63

Benneh, EY "Sovereignty Immunity and International Crimes" (2002–2004) 22 *Ghana Law Journal* 112

Bianchi, A "Human Rights and the Magic of *Jus Cogens*" (2008) 19 *European Journal of International Law* 491

Brunnée, J "The Prohibition on Torture: Driving *Jus Cogens* Home?" (2010) 104 *Proceedings of the Annual Meeting of the American Society of International Law* 454

Byers, M "Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes Rules*" (1997) 66 *Nordic Journal of International Law* 211

Cançado Trindade, A "*Jus Cogens* in Contemporary International Law", UN Audiovisual Library, (http://www.un.org/law/avl)

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